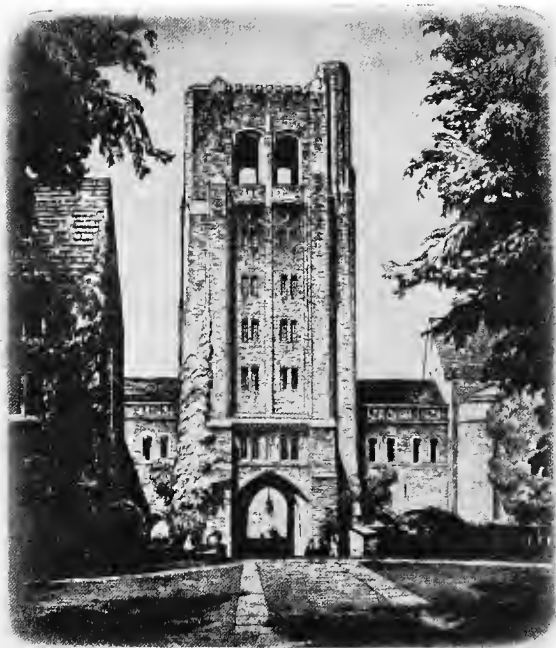


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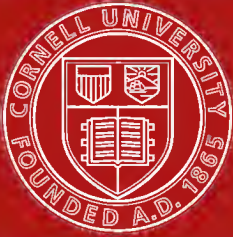
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THE LAW
OF
VOID JUDICIAL SALES

THE LEGAL AND EQUITABLE RIGHTS OF PUR-
CHASERS AT VOID JUDICIAL, EXECUTION
AND PROBATE SALES, AND THE

CONSTITUTIONALITY OF SPECIAL
LEGISLATION

VALIDATING VOID SALES, AND AUTHORIZING INVOLUN-
TARY SALES IN THE ABSENCE OF JUDI-
CIAL PROCEEDINGS.

FOURTH EDITION.

REVISED, ENLARGED AND BROUGHT DOWN TO DATE.

BY A. C. FREEMAN,

*Author of Treatises on "Judgments," "Executions," "Co-tenancy and
Partition," Etc.*

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1902.

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CHAPTER I.

INTRODUCTORY.

§ 1. **Plan and Scope of the Work—Sundry Definitions.**
—We propose, in the following pages, to direct our attention, and that of our readers, to void execution and judicial sales, and the legal and equitable rights of purchasers thereat. Having considered these questions, we shall conclude with inquiries concerning the constitutionality of those curative acts, and that class of special legislation, attempting either to validate invalid judicial sales, or to authorize involuntary sales, in the absence of any judicial proceedings whatever. In the terms “judicial and execution sales,” as we here use them, are embraced all sales made in pursuance of the orders, judgments or decrees of courts, or to obtain satisfaction of such orders, judgments or decrees. Precisely what sales can accurately be denominated “judicial” is not very well settled. Of course they must be the result of judicial proceedings, and the order, decree or judgment on which they are based must direct the sale of the property sold. There can be no judicial sale except on a pre-existing order of sale.¹ And probably the order of sale, is not, alone, sufficient to entitle the sale to be called

¹ *Minnesota Co. v. St. Paul Co.*, 2 Wall. 640.

judicial. In a State where an administrator's sale, though made by virtue of an order of court, was not required to be reported to the court nor to be confirmed, Judge Story held it not to be a judicial sale.¹ If, however, a sale is ordered by the court, is conducted by an officer appointed by, or subject to, the control of the court, and requires the approval of the court before it can be treated as final, then it is clearly a judicial sale. Such a sale is unquestionably a sale by the court.² Possibly we have erred in supposing that a sale cannot properly be regarded as judicial unless previously authorized by a court. The true test is, that it must be one which is, in contemplation of law, made by the court, and there may be circumstances when such is the case, though there is no pre-existing order directing or authorizing the sale, as where the property is in the hands of a receiver appointed by the court and given power by law to make sales thereof,³ or of an executor upon whom a power of sale is conferred by the will, if the sale must be reported to, and confirmed by the court.⁴

Sales made in proceedings for partition are undoubtedly judicial;⁵ so are sales made by administrators and guardians under the practice pursued in most of the States.⁶ Execution sales are not judicial.⁷ They must, it is true, be supported

¹ *Smith v. Arnold*, 5 Mason, 420; *McGuinness v. Whalen*, 16 R. L. 558, 27 Am. St. Rep. 763.

² *Forman v. Hunt*, 3 Dana, 621.

³ *Campbell v. Parker* (N. J. Ch.), 45 Atl. Rep. 116.

⁴ *Warehime v. Graf*, 83 Md. 98.

⁵ *Freeman on Co-tenancy and Partition*, sec. 548; *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297; *Girard L. Ins. Co. v. F. & M. Bank*, 57 Pa. St. 388.

⁶ *Vandever v. Baker*, 13 Pa. St. 121; *Sackett v. Twining*, 18 Pa. St. 199, 57 Am. Dec. 599; *Halleck v. Guy*, 9 Cal. 195, 70 Am. Dec. 643; *Hutton v. Williams*, 35 Ala. 517, 76 Am. Dec. 297; *Moore v. Shultz*, 13 Pa. St. 98, 53 Am. Dec. 446; *Lynch v. Baxter*, 4 Tex. 431, 51 Am. Dec. 735; *Mason v. Osgood*, 64 N. C. 467; *Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572; *Maul v. Hellman*, 39 Neb. 322.

⁷ *Griffith v. Fowler*, 18 Vt. 394.

by a judgment, decree or order. But the judgment is not for the sale of any specific property. It is only for the recovery of a designated sum of money. The court gives no directions, and can give none concerning what property shall be levied upon. It usually has no control over the sale beyond setting it aside for non-compliance with the directions of the statutes of the State. The chief differences between execution and judicial sales are these: the former are based on a general judgment for so much money, the latter on an order to sell specific property; the former are conducted by an officer of the law in pursuance of the directions of a statute, the latter are made by the agent of a court in pursuance of the directions of the court; in the former the sheriff is the vendor, in the latter the court; in the former the sale is usually complete when the property is struck off to the highest bidder, in the latter it must be reported to and approved by the court.¹ But our present purpose does not require us to announce any tests by which to determine what sales are judicial, nor to separate the different classes of judicial sales from one another. We shall assume that judicial sales embrace: 1st, those made in chancery; 2d, those made by executors, administrators and guardians, when acting by virtue of authority derived from orders of sale obtained in judicial proceedings; and, 3d, all other cases where property is sold under an order or decree of court designating such property and authorizing its sale.

Void sales, whether execution or judicial, may, for convenience of treatment, be divided into two great classes: 1st, those which are void because the court had no authority

¹ *Andrews v. Scotton*, 2 Bland, 636; *Schindel v. Keedy*, 43 Md. 417. A sale made by assignees acting under an assignment for the benefit of creditors, is, in Ohio, a judicial sale, because the proceedings and sale are, by the statute of that State, required to be conducted under the supervision and subject to the confirmation of the probate court. *Dresback v. Stein*, 41 Ohio St. 70.

to enter the judgment or order of sale; 2d, those which, though based on a valid judgment or order of sale, are invalid from some vice in the subsequent proceeding, or because the judgment or order has lost its original force by appeal, lapse of time, satisfaction, or some other adequate cause. The word void, though apparently free from ambiguity, is employed in various senses. Accurately speaking, a thing is not void unless it has no force or effect whatever. "A conveyance cannot be said to be utterly void unless it is of no effect whatsoever, and is incapable of confirmation or ratification."¹ "Another test of a void act or deed is, that every stranger may take advantage of it, but not of a voidable one. Again, a thing may be void in several degrees: 1st, void, so as if never done, to all purposes, so that all persons may take advantage thereof; 2d, void to some purposes only; 3d, so void by operation of law that he that will have the benefit of it may make it good."² In the terms "void sales," as employed in this work, we include all those sales which, as against the original purchaser, may, without any proceedings to set them aside, be treated as not transferring the title of the property assumed to be sold. These sales, it will be shown, may be ratified or confirmed. Many of them give rise to important equitable rights in favor of the original purchaser or his grantee. Some of them, while conferring neither legal nor equitable rights on the original purchaser, become, in the hands of his innocent vendees for value, in good faith and without notice, valid both at law and in equity.

¹ *Boyd v. Blankman*, 29 Cal. 35, 87 Am. Dec. 746.

² *Anderson v. Roberts*, 18 Johns. 527, 9 Am. Dec. 235.

CHAPTER II.

SALES VOID BECAUSE THE COURT HAD NO AUTHORITY TO
ENTER THE JUDGMENT, OR ORDER OF SALE.

SECTION.

2. Jurisdiction, and the Effect of a Want of.
3. Kinds and Sources of Jurisdiction.
4. Instances of Want of Jurisdiction of Probate Courts over the Subject-matter.
- 4*a*. Judgments and Orders in Excess of Jurisdiction.
5. Means of Acquiring Jurisdiction.
6. Cases in which the Judge is Disqualified from Acting.
7. Suspension or Loss of Jurisdiction.
- 7*a*. Suspension or Loss of Right to Enforce a Judgment or Order.
8. General Principles Governing Questions of Jurisdiction.

ORDERS OF SALE IN PROBATE, AND HOW AUTHORITY TO MAKE MUST
BE OBTAINED.

9. When Sales may be Made without any License of Court.
- 9*a*. What Property may be Subject to an Effective Administrator's or Executor's Sale.
- 9*b*. The Time within which the Petition may be Presented and Properly Granted.
10. Petition for License must be by Person Competent to Present it.
11. Sufficient Petition is Indispensable; what Petitions are Sufficient.
12. Statutes Designating what Petition must Contain.
13. Petitions for Sales Liberally Construed;—Referring to Other Papers.
14. Not Fatal that Petition is not, in fact. True.
15. Notice of Application to Sell, Cases Holding it Unnecessary.

16. Notice of Application to Sell, Cases Holding it Necessary.
17. Notice of Application; Service on Minor not to be Waived nor Dispensed with.
18. Notice of Application must be Given in the Manner Prescribed by Law.
19. Notice of Application must be Given for the Time Prescribed by Law.
- 19a. Irregularities Occurring after Giving Notice of the Application.
20. The License, or Order to Sell, and its Effect as an Adjudication.

§ 2. **The Effect of Want of Jurisdiction.**—A void judgment, order or decree, in whatever tribunal it may be entered, is, in legal effect, nothing. “All acts performed under it, and all claims flowing out of it, are void.”¹ Hence, a sale, based on such a judgment, has no foundation in law. It must certainly fall.² Judicial proceedings are void when the court, wherein they take place, is acting without jurisdiction. “The power to hear and determine a cause is jurisdiction: it is *coram judice* whenever a cause is presented which brings this power into action; if the petitioner states such a case in his petition, that on a demurrer the court would render judgment in his favor, it is

¹ Freeman on Judgments, sec. 117; White v. Foote, L. & M. Co., 29 W. Va. 385, 6 Am. St. Rep. 650; Moyer v. Bucks, 2 Ind. App. 571, 50 Am. St. Rep. 251; Cox v. Boyce, 152 Mo. 576, 75 Am. St. Rep. 483; Stafford v. Gallops, 123 N. C. 19, 68 Am. St. Rep. 815; Savage v. Sternberg, 19 Wash. 679, 67 Am. St. Rep. 751.

² Freeman on Executions, sec. 16, note 2; Gray v. Hawes, 8 Cal. 562; Gunz v. Heffner, 33 Minn. 215, 22 N. W. Rep. 386; Shaefer v. Gates, 2 B. Mon. 453, 38 Am. Dec. 164; Cravens v. Moore, 61 Mo. 178; Barber v. Morris, 37 Minn. 194, 5 Am. St. Rep. 836; Olson v. Nunnally, 47 Kan. 391, 27 Am. St. Rep. 296; St. Louis, etc., Ry. Co. v. Lowder, 138 Mo. 533, 60 Am. St. Rep. 565. A sale under a void judgment does not entitle the purchaser to the benefit of a statute requiring actions to be brought “within five years, where the defendant claims title to the land in question, by or through some deed made upon a sale thereof by an executor, administrator or guardian, or by a sheriff or other proper ministerial officer under the order, judgment, decree or process of a court or legal tribunal of competent jurisdiction within this State.” Miller v. Babcock, 29 Mich. 526.

an undoubted case of jurisdiction.”¹ “It is, in truth, the power to do both or either—to hear without determining, or to determine without hearing.”² “Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in a given case. To constitute this there are three essentials: 1. The court must have cognizance of the class of cases to which the one adjudged belongs. 2. The proper parties must be present; and 3. The point decided must be in substance and effect within the issue.”³ It must be constantly remembered that jurisdiction is indispensable to the validity of all judicial proceedings; that if the proceedings taken to obtain jurisdiction are radically defective, all subsequent steps are unavailing, however regular they may be. Thus, though the proceedings in a probate court to obtain an order of sale, and also the proceedings subsequent to the order, are all perfectly regular, yet the sale is utterly void, if it can be shown that there was no valid grant of administration, because the court had no jurisdiction to grant it.⁴

It may also be shown that an apparent grant of administration was not the act of the court or judge, but of the clerk or of some other person, who used blanks signed by the judge. Judicial authority cannot be delegated; and, although the judge left signed blanks with the clerk, intending for the latter to fill them up, and issue or enter them as the act of the court, still the clerk's act is not judicial, and his grant of administration is not binding as a judicial act.⁵

¹ United States v. Arredondo, 6 Pet. 709.

² *Ex parte* Bennett, 44 Cal. 88.

³ Hope v. Blair, 105 Mo. 85, 24 Am. St. Rep. 366; *Munday v. Vail*, 34 N. J. Law, 422; *Freeman on Judgments*, § 120c.

⁴ *Summer v. Parker*, 7 Mass. 79; *Unknown Heirs v. Baker*, 23 Ill. 490; *Smith v. Rice*, 11 Mass. 507; *Chase v. Ross*, 36 Wis. 267; *Withers v. Paterson*, 27 Tex. 501, 86 Am. Dec. 643; *Ex parte Baker*, 2 Leigh, 719; *Miller v. Jones*, 26 Ala. 247. (See sec. 10.)

⁵ *Roderigas v. East River Sav. Inst.*, 76 N. Y. 316, 32 Am. Rep. 309.

The court may, in the particular instance in which it has acted, proceed without authority. If so, its action is extra-judicial and cannot support a sale based upon it. Hence, if a partition sale is made in an action in which service of process was omitted as to some of the co-tenants, or in a case where there were persons owning estates in remainder, and by the local statutes the court had no authority under such circumstances to order or confirm a sale, the sale in the case first supposed cannot divest the interest of the co-tenants who were not served with process,¹ while in the latter case the whole proceedings are void for want of jurisdiction over the subject-matter.²

§ 3. **Kinds and Sources of Jurisdiction.**—"Jurisdiction is conferred upon courts by the constitution and laws of the country in which they are situate, authorizing them to hear and determine causes between parties, and to carry their judgments into effect."³ The power to hear a particular class of cases, or to determine controversies of a specified character, is called jurisdiction over the subject-matter. This jurisdiction is conferred by the "authority which organizes the court, and it is to be sought for in the general nature of its powers, or in authority specially conferred by statute. If the order or judgment on which a sale was made, was one resulting from a controversy which the court had in no circumstances any power to determine, there was an absence of jurisdiction over the subject-matter, and the sale is incurably void."⁴ When jurisdiction is attempted to be conferred by statute, it is, of course, essential that the enactment be within the constitutional authority of the legislature. If not, a judgment rendered in the exercise of the supposed jurisdiction is void, and cannot be

¹ Childs v. Harpman, 72 Ga. 791.

² Young's Admr. v. Rathbone, 16 N. J. Eq. 224. 84 Am. Dec. 151.

³ Freeman on Judgments, sec. 119.

⁴ Freeman on Judgments, sec. 120; Higgins v. Bordages, 88 Tex. 458, 53 Am. St. Rep. 770.

validated by any subsequent legislative action.¹ In addition to jurisdiction over the subject-matter, it is also indispensable that the court should have jurisdiction over the person or thing against which its judgment operates. Jurisdiction over a subject-matter must be conferred by law;² jurisdiction over a person may be conferred by his consent. If jurisdiction over a person is not conferred by his consent, or obtained in the manner designated by law, the judgment against him is void, and cannot support any sale of his property.³

Where jurisdiction has not been obtained by consent, inquiry must be instituted for the purpose of ascertaining whether the court could take jurisdiction without such assent. The right to take such jurisdiction must be conferred by some valid law, which must provide some process or other mode of notice to the defendant, and some method by which it must be served upon or given to him. The service of process in a mode not sanctioned by law cannot give a court jurisdiction over the defendant, however well calculated the process or the service may be to inform him of the proceeding against him. There cannot, we conceive, be any *judgment in personam* when the person named as a defendant, whether a natural or an artificial person, has no existence. It is true that if he has been a natural person he may have left heirs, and if an artificial person, stockholders or others entitled to share in the distribution of the assets, but neither, in our opinion, can be estopped from showing that when the action was commenced the defendant, if a natural person, was dead,⁴ or if a corporation had been dissolved,⁵ and hence that the judgment is absolutely

¹ *In re Christensen*, 17 Utah, 312, 70 Am. St. Rep. 794.

² *Dakin v. Deming*, 6 Pai. 95.

³ *Great W. M. Co. v. Woodman of A. M. Co.*, 12 Colo. 46, 13 Am. St. Rep. 204; *Moyer v. Bucks*, 2 Ind. App. 571, 50 Am. St. Rep. 251.

⁴ *Reid v. Holmes*, 127 Mass. 326; *Shea v. Shea*, 154 Mo. 599, 77 Am. St. Rep. 779; *Freeman on Judgments*, sec. 153.

⁵ *Life Association v. Fassett*, 102 Ill. 315; *District of Clay v. District*

void, because the court never had jurisdiction over the supposed defendant.

The statute purporting to authorize the service of process may not be conclusive of the question, for no State or nation has any authority to legislate with respect to persons or property not within its jurisdiction.¹ If the defendant was not a resident of the State or nation whose tribunals pronounced judgment against him, and was not served with process within its territory, and did not voluntarily appear and submit himself to their jurisdiction, such judgment cannot operate against him *in personam*, whether the service of process was actual or constructive.² In such cases the vice of the proceedings is not dependent on the mode of service of the process of the court, but upon the fact that the court had no power to require the defendant to appear before it and submit his rights to its decision. Hence, in a proceeding against a non-resident infant to cancel a contract, the court has no authority over him. It cannot make service of process on him out of the State, and from such service acquire authority to appoint a guardian *ad litem* to appear for him. A judgment supported by such service and the appointment and appearance of such guardian is void.³ Courts having jurisdiction over the estates of decedents are necessarily restricted to property within the State, or at least to property belonging to

of Buchanan, 63 Iowa, 188; Merrill v. President, etc., 31 Me. 57, 50 Am. Dec. 649; Sturges v. Vanderbilt, 73 N. Y. 384.

¹ Sturges v. Fay, 16 Ind. 429, 79 Am. Dec. 440; Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314; Griffith v. Milwaukee H. Co., 92 Iowa, 634, 54 Am. St. Rep. 573; Willamette R. E. Co. v. Hendrix, 28 Or. 485, 52 Am. St. Rep. 800; Wilson v. St. Louis, etc., Co., 108 Mo. 588, 32 Am. St. Rep. 24.

² Pennoyer v. Neff, 95 U. S. 722; Belcher v. Chambers, 53 Cal. 636; Louisville, etc., R. R. Co. v. Nash, 118 Ala. 477, 72 Am. St. Rep. 181; Hinton v. Penn M. L. I. Co., 126 N. C. 18, 78 Am. St. Rep. 636; McCreery v. Davis, 44 S. C. 195, 51 Am. St. Rep. 794; Davis v. Wakelee, 154 U. S. 685.

³ Insurance Company v. Bangs, 103 U. S. 435.

decedents who, at the time of their death, were residents or citizens of the State. A grant of administration of the estate of a non-resident decedent leaving no estate within the State is void.¹ The courts of every nation, however, have jurisdiction over all property within its territorial limits, irrespective of the citizenship or residence of its owners, and may exercise this jurisdiction by proceedings *in rem* against such property. Perhaps the proceeding will be treated as *in rem* in every instance in which the property is seized or levied upon under process issued in the case, though such seizure or levy is professedly for the purpose of creating a lien. It has, therefore, been held that if real estate of a non-resident defendant is attached, a judgment against him in the same action, founded on constructive service of process, will support a sale of such real estate.²

When the defendant is a non-resident and his property is attached it is usually necessary, for the purpose of obtaining such jurisdiction as will entitle the court to enter a judgment enforceable against the property, to serve summons, actual or constructive, in the mode designated by the statute,³ and also that there be a valid cause of attachment, and that all the proceedings be taken which are essential to the issue and levy of the writ. We shall not here enter upon any consideration of the question of what is a sufficient constructive or other service of summons or like process when the person served is beyond the limits of the State. It is sufficient for our present purpose to say

¹ *Malloy v. Burlington & M. R. Co.*, 53 Kan. 557; *Morse v. Mutual, etc.*, Assn., 45 La. Ann. 736; *Fletcher v. McArthur*, 68 Fed. Rep. 65, 15 C. C. A. 224, 37 U. S. App. 69; *People's S. B. v. Wilcox*, 15 R. I. 258, 2 Am. St. Rep. 894.

² *Anderson v. Goff*, 72 Cal. 65, 1 Am. St. Rep. 34; *Freeman v. Alderson*, 119 U. S. 285; *O'Sullivan v. Overton*, 56 Conn. 602; *Harris v. Daugherty*, 74 Tex. 1, 15 Am. St. Rep. 812.

³ *Drake v. Hale*, 38 Mo. 346; *Blossom v. Estes*, 84 N. Y. 614; *Walker v. Cottrell*, 6 Bax. 257; *Riley v. Nichols*, 1 Heisk. 17.

that, though such service is in all respects that required by statute, it is further essential that jurisdiction over the property be acquired by attachment. A writ issued when the plaintiff is not entitled to it cannot support a judgment founded upon it. It is not sufficient that the plaintiff filed the requisite affidavit for a writ and under it attached the property, if, upon the trial, it appears that, though he had a cause of action, it was not one upon which he was entitled to an attachment.¹ Generally, where jurisdiction is dependent upon an attachment, all the statutory provisions must be strictly pursued, and the facts giving jurisdiction must appear on the face of the record.² If an affidavit is required it is deemed an essential foundation upon which the judgment of the court must rest, and if no affidavit is made or filed, or that filed is wholly inadequate, the jurisdiction cannot be sustained.³ Still there are cases in which affidavits, though not sufficient if attacked by motion to vacate the writ, are not so wholly defective as to subject a judgment based thereon to collateral attack.⁴

It must not be forgotten that, though by the service of process against a non-resident a judgment may be entered against him personal in form, which will support the sale of

¹ *Mudge v. Steinhart*, 78 Cal. 34, 12 Am. St. Rep. 17; *German N. Bank v. Kautter*, 55 Neb. 103, 70 Am. St. Rep. 371. In this case it was held in a collateral attack on the judgment, that it might be shown that the affidavit for the attachment was false.

² *Haywood v. Collins*, 60 Ill. 328; *Thatcher v. Powell*, 6 Wheat. 119.

³ *Goss v. Board of Commrs.*, 4 Colo. 468; *De Leon v. Hiller*, 77 Ga. 740; *Manley v. Headley*, 10 Kan. 88; *Dickinson v. Cowley*, 15 Kan. 269; *Cantrell v. Letwinger*, 44 Miss. 437; *Bray v. McCleery*, 55 Mo. 128; *Hargadine v. Van Horn*, 72 Mo. 370; *Burnett v. McCleery*, 78 Mo. 676; *Duxbury v. Dohle*, 78 Minn. 427, 79 Am. St. Rep. 408; *Staples v. Fairchild*, 3 N. Y. 41; *Birchall v. Griggs*, 4 N. D. 305, 50 Am. St. Rep. 654; *Severn v. Geise*, 6 N. D. 523; *Stewart v. Mitchell*, 10 Heisk. 488; *Tacoma G. Co. v. Draham*, 8 Wash. 263, 40 Am. St. Rep. 907; *Miller v. White*, 46 W. Va. 67, 76 Am. St. Rep. 791.

⁴ *Hogue v. Corbett*, 156 Ill. 540, 47 Am. St. Rep. 232; *Miller v. White*, 46 W. Va. 67, 76 Am. St. Rep. 791.

his property when preceded by its attachment, or, when in foreclosure of a lien thereon, such judgment is not truly *in personam*, and hence cannot support a sale of property not subject to the attachment or other lien.¹ Therefore, if a deficiency remains after a sale under a judgment of foreclosure, based upon service of summons by publication or otherwise upon persons out of the State, there is no authority for docketing it as a personal judgment against the defendant, and if so docketed it, as well as every writ and sale based thereon, is void.² The same principle is applicable to decrees for the payment of alimony or maintenance rendered in a suit against a non-resident who has not been served with process within the State, nor voluntarily appeared. In so far as a suit affects the *status* of the parties as husband and wife by decreeing a dissolution of their marital relations, it is *in rem*, and the fact that the defendant is not within the territorial jurisdiction of the court is not necessarily an obstacle to proceeding to final judgment, but the judgment cannot impose any personal liability justifying the issuing of an execution and the levy and sale of property thereunder.³ Various other suits or actions may be prosecuted against non-residents to the extent of procuring judgments or decrees which are binding upon their property rights, as, for instance, suits to determine conflicting claims of title or actions of trespass to try title, but where the defendant has not appeared therein, no judgment can be recovered against him for

¹ Exchange Bank v. Clement, 109 Ala. 280; Cerdabac v. Strong, 67 Miss. 709; Eastman v. Dearborn, 63 N. H. 366.

² Blumberg v. Birch, 99 Cal. 416, 37 Am. St. Rep. 67; Latta v. Tutton, 122 Cal. 279, 68 Am. St. Rep. 30; Williams v. Follett, 17 Colo. 54.

³ De La Montanya v. De La Montanya, 112 Cal. 109, 53 Am. St. Rep. 168; Hervey v. Hervey, 56 N. J. Eq. 175; Rigney v. Rigney, 127 N. Y. 403, 24 Am. St. Rep. 462; Doerr v. Forsythe, 50 Ohio St. 726, 40 Am. St. Rep. 703.

costs nor for any other matter which will support an execution or other sale in satisfaction thereof.¹

Considered in connection with execution and judicial sales it is always necessary, unless the proceeding is *in rem*, for an intending purchaser to inquire who are the parties having title to, interests in, or liens upon the property, and have they been brought within the jurisdiction of the court, so that its judgment, decree, or order directing or authorizing the sale of the property is binding upon them to the extent that its sale must transfer their title, interest, and lien, or estop them from asserting it against him. To so bring them within the jurisdiction of the court, it is essential either that they have voluntarily appeared in the action or that process has issued against them and been served upon them in conformity to the law,² and whether it has been so issued and served must be ascertained from an examination of the process and the return of service thereon, or the jurisdictional statements or recitals found in the record, but may be presumed, if the court is of general jurisdiction, if nothing inconsistent therewith appears from such return and record. It is further essential to inquire whether all these parties have been brought before the court in the capacity in which they are entitled to or claim some estate, lien, or interest. "Every person may at different times or at the same time occupy different relations, act in different capacities, and represent separate and perhaps antagonistic interests. It is a rule, both of the civil and of the common law, that a party acting in one right can neither be benefited nor injured by a judgment for or against him when acting in some other right."³ Hence, if one has an interest in property in his own right, he may still assert it if made a party

¹ Hardy v. Beatty, 84 Tex. 562, 31 Am. St. Rep. 80.

² De La Montanya v. De La Montanya, 112 Cal. 101, 56 Am. St. Rep. 165; Jewett v. Iowa L. Co., 64 Minn. 531, 58 Am. St. Rep. 555; Evans v. Johnson, 39 W. Va. 299, 45 Am. St. Rep. 912.

³ Freeman on Judgments, § 156.

to an action only in a representative capacity, or if interested in a representative capacity may still assert it in such capacity if made a party to an action in his own right.¹

§ 4. **Instances of Want of Jurisdiction over the Subject-matter** are found more frequently in *probate proceedings* than elsewhere. If the statute of a State, governing the settlement and distribution of the estates of deceased persons, makes no provision concerning the estates of persons who died prior to the passage of such statute then an attempt to administer on one of the last named estates is a usurpation of authority over a subject-matter not within the jurisdiction of the court, and the proceedings are, therefore, invalid.² So, if a probate court should make an order for the sale of property situate in a State other than the one in which the order is made, this would also be an assumption of authority over a subject-matter not within the jurisdiction of the court, and would be void.³ This rule has been held to be applicable even where personal property, though in another State at the death of its owner, was subsequently brought within the State where the order was made.⁴ Courts of probate have no power to grant letters of administration, nor letters testamentary, on the estate of a living person. Letters may be granted, under a mistake of fact, upon the supposition that the testator, or

¹ *Stockton B. & L. Assn. v. Chambers*, 75 Cal. 332, 7 Am. St. Rep. 173; *First N. B. v. Shuler*, 153 N. Y. 163, 60 Am. St. Rep. 601; *Nickum v. Burckhart*, 30 Or. 464, 60 Am. St. Rep. 822; *Sonnenberg v. Steinbach*, 9 S. D. 518, 62 Am. St. Rep. 885.

² *Downer v. Smith*, 24 Cal. 114; *Coppinger v. Rice*, 33 Cal. 408; *Grimes v. Norris*, 6 Cal. 621, 65 Am. Dec. 545; *Adams v. Norris*, 23 How. (U. S.) 353; *Tevis v. Pitcher*, 10 Cal. 465; *McNeil v. Congregational Society*, 66 Cal. 105.

³ *Nowler v. Coit*, 1 Ohio, 519, 13 Am. Dec. 640; *Salmond v. Price*, 13 Ohio, 368, 42 Am. Dec. 204; *Watts v. Waddle*, 6 Pet. 389; *Wills v. Cowper*, 2 Ohio, 124; *Latimer v. R. R. Co.*, 43 Mo. 105, 97 Am. Dec. 378; *Price v. Johnson*, 1 Ohio St. 390.

⁴ *Varner v. Bevil*, 17 Ala. 286.

other person, is dead. The case is, nevertheless, one in which the court has no jurisdiction. If he who was supposed to have died is, in fact, living, all probate sales and other proceedings are void, and can have no effect on his title.¹ In but one State, so far as we are aware, has any attempt been made to authorize the administration upon the estate of one who may be living. By the Public Laws of Rhode Island, passed in 1882, provision is made for the granting of letters of administration "as if he were dead," upon the estate of one who has left the town of his domicile, and has not been heard from, directly or indirectly, for the term of seven years. This statute has been adjudged unconstitutional on the ground that "to administer upon a person's estate while he is still living is to deprive him of property contrary to the law of the land, or, as it is ordinarily said, without due process of law, and hence is in violation of article 1, section 10 of the constitution of this State, and also of article 14 of the amendments of the constitution of the United States."²

It seems scarcely necessary to observe that the grant of letters testamentary or of administration cannot bring within the jurisdiction of the court property or any interest therein not held by the decedent at the time of his death, and that it may always be shown as against a sale of such property, though apparently authorized by the court, that his interest therein had been conveyed or had otherwise termin-

¹ *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; *Griffith v. Frazier*, 8 Cranch, 9; *Fisk v. Norvel*, 9 Tex. 13, 58 Am. Dec. 128; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87; *Withers v. Patterson*, 27 Tex. 496, 86 Am. Dec. 643; *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Springer v. Shavender*, 116 N. C. 12, 47 Am. St. Rep. 791, 118 N. C. 33, 54 Am. St. Rep. 708; *Scott v. McNeil*, 154 U. S. 34. But a majority of the court of appeals of New York declared, in *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, that a grant of administration upon the estate of a living person was not void. But see a further decision in the same case, 76 N. Y. 316, 32 Am. Rep. 309.

² *Carr v. Brown*, 20 R. I. 217, 79 Am. St. Rep. 855.

ated prior to his death.¹ Grants of letters of administration were formerly adjudged to be void unless the deceased did, in fact, die intestate.² Surrogate and probate courts are usually limited in their jurisdiction to a specified class of cases. Thus, it is generally required that a man's estate be settled in the county where he resided at the time of his death. If it appears that letters testamentary or of administration were granted in a county in which the deceased did not reside, the whole proceedings must be regarded as void.³ How, and in what circumstances this fact may be made to appear, are questions to which adverse answers may be found in the authorities. Undoubtedly the records of the court may be inspected. If they show the non-residence of the deceased, they are competent evidence of their own invalidity. If they fail to assert anything about the residence, either in the averments of the petition or in the findings of the court, we should judge this to be fatal. In

¹ *O'Connor v. Vineyard*, 91 Tex. 488.

² *Holyoke v. Haskins*, 5 Pick. 24, 16 Am. Dec. 372; *Brook v. Frank*, 51 Ala. 91; *Kane v. Paul*, 14 Pet. 39; *Griffith v. Frazier*, 8 Cranch, 24. This rule is believed to be absolute in the United States. In its stead we have adopted the rule that a grant of administration, made by a court having jurisdiction of the subject-matter and of the particular case, while it remains unrevoked, cannot be regarded as void. "Nor can the recall or repeal of the appointment be fairly regarded as placing the appointees of the court in the same position as if the decree never existed. On the contrary, all acts done in the due course of administration, while such decrees remain in force, must be held entirely valid." *Redfield on Wills*, Part II, p. 109; *Bigelow v. Bigelow*, 4 Ohio, 138, 19 Am. Dec. 597; *Kittredge v. Folsom*, 8 N. H. 98; *Ward v. Oaks*, 42 Ala. 225; *Jennings v. Moses*, 38 Ala. 402; *Broughton v. Bradley*, 34 Ala. 694; *Brook v. Frank*, 51 Ala. 91. But one who deals with an executor is not protected if he has notice of the existence of a later will than the one admitted to probate. *Gaines v. De La Croix*, 6 Wall. 720.

³ *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703; *Harlan's Estate*, 24 Cal. 182, 85 Am. Dec. 58; *Moore v. Philbrick*, 32 Me. 102, 52 Am. Dec. 642; *Munson v. Newson*, 9 Tex. 109; *Cutts v. Haskins*, 9 Mass. 543; *Holyoke v. Haskins*, 5 Pick. 20, and 9 Pick. 259, 16 Am. Dec. 372; *Goodrich v. Pendleton*, 4 Johns. Ch. 549.

every case it ought to appear, *prima facie*, that the court had jurisdiction over the estate. Usually a petition is presented to the court or judge, in which the facts authorizing the assumption of jurisdiction in the particular case are stated. The duty of the court or judge is to investigate and determine the truth of these jurisdictional allegations. Its subsequent grant of letters implies that these allegations have been found to be true. "Whenever the jurisdiction of a court not of record depends on a fact which it is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive, and not subject to any collateral attack."¹ Hence, in a case where a probate court has, upon a petition asserting the essential jurisdictional facts, and after notice to the parties in interest, given in the manner prescribed by law, granted letters testamentary or of administration, the proceedings cannot be avoided collaterally, in the majority of the States, by proof that the deceased did not die within the jurisdiction of the court.² Any other rule would lead to the most embarrassing results. The residence of a deceased person can be determined only by hearing parol evidence. Different judges may reach opposite conclusions from the same evidence. The parties in interest may at separate times produce different evidence on the same issue. If, after a court had heard and decided the issue concerning the residence of the deceased, the question remained

¹ Freeman on Judgments, sec. 523.

² *Irwin v. Scribner*, 18 Cal. 499; *Lewis v. Dutton*, 8 How. Pr. 103; *Andrews v. Avery*, 14 Gratt. 236, 72 Am. Dec. 355; *Warfield's Estate*, 22 Cal. 51, 83 Am. Dec. 49; *Sutton v. Sutton*, 13 Vt. 71; *Fisher v. Bassett*, 9 Leigh, 119, 33 Am. Dec. 227; *Barrett v. Garney*, 33 Cal. 530; *Driggs v. Abbott*, 27 Vt. 581, 65 Am. Dec. 214; *Burdett v. Silsbee*, 15 Tex. 615; *Monell v. Dennison*, 17 How. Pr. 422; *Abbott v. Coburn*, 28 Vt. 663, 67 Am. Dec. 735; *Rarborg v. Hammond*, 2 H. & G. 42; *King v. Connell*, 105 Ala. 590, 53 Am. St. Rep. 144; *Bradley v. Missouri, etc., Ry. Co.*, 51 Neb. 653, 66 Am. St. Rep. 473. See also *Riley v. McCord*, 24 Mo. 265; *Wight v. Wallbaum*, 39 Ill. 554.

unsettled to such an extent that it could be relitigated for the purpose of avoiding all the proceedings of the court, no person would have the temerity to deal with executors or administrators.

§ 4a. Judgments and Orders in Excess of Jurisdiction.

—Though a court has jurisdiction of the parties and of a subject-matter with which it is competent to deal, it may, nevertheless, enter a judgment or order absolutely void, because not within such subject-matter or in excess of any power which the court may exercise over it. Thus, a court having jurisdiction of the estate of a decedent or of a minor or incompetent person does not have an absolute power of disposal of it, and must find in the law a support for every order made respecting it. Otherwise the order may be disregarded as void, and whoever attempts to deraign title under it must fail. A court of probate having jurisdiction to partition the real estate of a decedent cannot partition property of which he was but a part owner, though the other owners are also his heirs at law.¹ If a court has authority to mortgage and sell it cannot authorize an exchange,² nor can it authorize a sale of property belonging partly to an infant, upon whose estate it has granted letters of guardianship, and partly to a third person, though the object is to effect a partition between them.³ A judgment is also void in so far as it assumes to deal with parties not before the court,⁴ or with property not within its territorial jurisdiction,⁵ or though within such jurisdiction not described in the complaint.⁶ Many other illustrations might be given of judgments or orders which are void

¹ Buckley v. Superior Court, 102 Cal. 6, 41 Am. St. Rep. 135.

² Moran v. James, 45 N. Y. Supp. 537, 47 *Id.* 486; Perin v. Megibben, 53 Fed. Rep. 86.

³ Glasgow v. McKinnon, 79 Tex. 116.

⁴ Houser v. Smith, 19 Utah, 150; Dunfee v. Childs, 45 W. Va. 155.

⁵ Rogers v. Cady, 104 Cal. 288, 43 Am. St. Rep. 100.

⁶ Falls v. Wright, 55 Ark. 562, 29 Am. St. Rep. 78.

though the court had jurisdiction of the parties and of some subject-matter before it, because it undertook either to determine some issue not presented by the pleadings, or to grant some relief not within such issues.¹ Judgments or orders of this character do not usually result in execution or judicial sales, but where they do such sales must be declared void, as where the court entered a personal judgment in an action in which such judgment was entirely unauthorized by the pleadings,² or undertook to direct a sale of specific real property when no cause for such sale was shown, or the property was not described in the pleadings upon which the judgment or order was based.³

When a sale is made by a receiver it is incumbent on the purchaser to ascertain whether the court had jurisdiction to appoint him, and whether, notwithstanding such appointment may have been authorized, its and his authority over the property still continued to the extent of authorizing him to sell and transfer it. It is true that in a collateral attack upon an order appointing a receiver, "if the jurisdiction of the court can in any event be upheld and its action validated, this will be done, even though the facts showing such jurisdiction are defectively stated and inferences must be indulged to support the judgment."⁴ But confessedly the appointment of a receiver in a case and under circumstances in which the court had not authority to make it is void.⁵ Relief against it need not be sought by appeal but may be by *certiorari*, or sometimes by prohibition. Nor is it

¹ *Watkins L. M. Co. v. Mullen* (Kan. App.), 54 Pac. Rep. 921; *Munday v. Vail*, 43 N. J. Law, 418; *Reynolds v. Stockton*, 43 N. J. Eq. 211, 3 Am. St. Rep. 305, 140 U. S. 254; *Metcalf v. Hart*, 3 Wyo. 513, 31 Am. St. Rep. 122.

² *Gille v. Emmons*, 58 Kan. 118, 62 Am. St. Rep. 609.

³ *Seamster v. Blackstock*, 83 Va. 232, 5 Am. St. Rep. 262; *Jackson v. Miles*, 94 Ga. 484, 98 Ga. 512.

⁴ *Illinois, etc., S. B. v. Pacific Ry. Co.*, 115 Cal. 285.

⁵ *Statc v. Union N. B.*, 145 Ind. 537, 57 Am. St. Rep. 209; *Larsen v. Winder*, 14 Wash. 109, 53 Am. St. Rep. 864.

indispensable that any affirmative action be taken for the purpose of vacating the appointment, for if it was void this may be shown collaterally in any proceeding in which it may be material.¹ The appointment may be void, because at the time it was made the court had not acquired jurisdiction of the parties or of the subject-matter.² It may, on the other hand, have jurisdiction of the subject-matter of the action and of all the parties thereto, and its appointment of the receiver nevertheless be void, and therefore subject to collateral attack, if in excess of what the court had jurisdiction to do at the time it was made.³ Hence, though in a suit to foreclose a mortgage the court has jurisdiction of the parties and of the subject-matter, yet its appointment of a receiver therein in a case not authorized by law is void, though the parties to the suit have stipulated that the receiver may be appointed.⁴ “Where a court has no authority under the law to appoint a receiver, such authority cannot be conferred by consent or stipulation of the parties. In such case consent of parties cannot confer jurisdiction upon a court, nor impose upon it the duty of taking care of and disposing of the property. It might as well be said that in a suit upon a promissory note, or upon any simple contract for the payment of money, a stipulation in the instrument by which the debt was evidenced that the court might appoint a receiver upon suit brought would give jurisdiction to the court to appoint such receiver; or that there could be a specific performance of a contract in any

¹ *Los Angeles C. W. Co. v. Superior Court*, 124 Cal. 385.

² *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192; *Murray v. Superior Court*, 129 Cal. 628; *State v. Superior Court*, 15 Wash. 668, 55 Am. St. Rep. 907.

³ *Guy v. Doak*, 47 Kan. 236; *Whitney v. Hanover N. B.*, 71 Miss. 1009; *State v. Ross*, 122 Mo. 435; *State v. Johnston*, 21 Mont. 155, 69 Am. St. Rep. 645; *Adler v. Turnbull*, 57 N. J. Law, 62; *Thurber v. Miller*, 11 S. D. 124.

⁴ *Ober v. Manufacturing Co.*, 44 La. Ann. 570; *Whitney v. Hanover N. B.*, 71 Miss. 1009; *Johnson v. Powers*, 21 Neb. 292.

kind of case because the parties had stipulated for a decree of specific performance."¹ So, if by the entry of a final judgment the court has exhausted its jurisdiction over the parties and the subject-matter, it cannot subsequently appoint a receiver, "if its order is not designed to carry into effect the judgment rendered, but is in effect a new adjudication in the nature of a decree of foreclosure depriving the plaintiff of property held by him under constitutional guaranties and of which he cannot be deprived without due process of law."² In this case, it appeared that in an action for divorce a receiver had been appointed who had not taken any property into his possession. Under the final judgment granting the divorce he was continued in authority and directed to prosecute and to take all measures necessary to enforce the payment of alimony awarded by the decree. Acting on the authority supposed to be conferred upon him by his appointment and by such decree, he sold certain real property, and the purchaser applied for a writ of assistance, but he was not entitled thereto because the appointment of the receiver was void.

In proceedings to foreclose a mortgage or other lien persons supposed to claim adverse liens or titles are often made parties defendant for the purpose of obtaining a judgment against them which will in effect determine the validity of their claims, to the end that the purchaser may feel assured that he will obtain a perfect title, or, at least, one which cannot be assailed and overcome by any of the parties to the suit. While there is some conflict upon this subject, the decided weight of authority affirms that in such a suit the court has no jurisdiction which will enable it to do more than to authorize measures necessary to the vesting in the purchaser of the title held at its inception by the mortgagor or the other person by or against whom the lien

¹ *Baker v. Varney*, 129 Cal. 564.

² *White v. White*, 130 Cal. 597, 80 Am. St. Rep. 150.

was created. It is true, perhaps, that if the person made a party defendant and holding some claim precedent or paramount to that of the lien appears and files an answer setting out such claim, and the court adjudicates thereon, its determination, if not revised and vacated upon appeal, may not subsequently be avoided on the ground that it was in excess of its jurisdiction; but in the absence of such answer, the judgment cannot affect such adverse or paramount lien or claim whatsoever be the allegations of the complaint respecting its being subordinate or subject to the lien sought to be foreclosed.¹ "The object of a suit for the foreclosure of a mortgage is to subject to a judicial sale and vest in the purchaser thereunder the same title or estate in the mortgaged property which the mortgagor had at the time of the execution of the mortgage, and the only proper or necessary parties defendant to such suit are the mortgagor and those who claim an interest in the property derived subsequent to the date of the mortgage. Titles adverse to that of the mortgagor, or superior to that covered by the mortgage, are not proper subjects for determination in the suit.² Whenever it is made to appear that the interest of a defendant is adverse or superior to that covered by the mortgage, the proper action of the court is to dismiss him from the suit.³ If, however, the plaintiff makes the holder of an adverse title a party defendant to the foreclosure suit, setting forth facts from which he claims that such title is subordinate to his mortgage, and issues upon such facts are presented for adjudication without objection the part of the defendant, the

¹ *Beronio v. Ventura C. L. Co.*, 129 Cal. 232, 79 Am. St. Rep. 118; *Murray v. Etchepare*, 129 Cal. 318; *Farmers' N. B. v. Gates*, 33 Or. 388, 72 Am. St. Rep. 724; note to *Provident L. T. Co. v. Marks*, 68 Am. St. Rep. 354-362.

² *Jones on Mortgages*, § 1589; *Wiltie on Foreclosures*, §§ 191, 192; *McComb v. Spangler*, 71 Cal. 418.

³ *Ord v. Bartlett*, 83 Cal. 428; *Code v. Bean*, 93 Cal. 578; *Hoppe v. Fountain*, 104 Cal. 94.

judgment of the court thereon will not be void. The court may decline to pass upon the question as not germane to the suit for foreclosure, or it may determine that such claim of the defendant is unfounded, or that his interest in the premises is subordinate to the mortgage, or it may render a decree of foreclosure subject to the prior rights of such defendant. The subject-matter of such controversy will be within the jurisdiction of the court, and if the parties thereto submit the controversy to its determination, the judgment thus rendered will be as conclusive upon them as if rendered in an action specially brought for that purpose, and will not be subject to collateral attack.¹ Under the usual allegation in a complaint for foreclosure that a defendant other than the mortgagor claims some interest in the premises, and that such interest is subsequent and subordinate to that created by the mortgage, any prior interest held by such defendant is not affected by the judgment therein. Such averment is not material to the plaintiff's cause of action, nor is it an issuable fact, and whether the court rendered judgment upon the default of the defendant, or upon an issue created by his denial of this averment, without setting forth the character of his interest, any prior interest held by him is not affected by such judgment."²

§ 5. **Methods of Acquiring Jurisdiction.**—Jurisdiction over a complainant is obtained by his coming before the court and making his complaint in a manner recognized by law. This is usually by a statement in writing, filed in the court or with the clerk thereof. Jurisdiction over the defendant is obtained by his voluntary appearance in the action, or by the service of process upon him. Jurisdiction over a thing proceeded against *in rem* is acquired by its

¹ *Helck v. Reinheimer*, 105 N. Y. 470; *Goebel v. Iffla*, 111 N. Y. 170; *Cromwell v. McLean*, 123 N. Y. 474.

² *Beronio v. Ventura C. L. Co.*, 129 Cal. 232, 79 Am. St. Rep. 118. *Contra*: *Provident L. T. Co. v. Marks*, 59 Kan. 230, 68 Am. St. Rep. 349.

seizure under the process of the court.¹ If a defendant neither appears, nor is served with process, a judgment against him is void. If, however, he is served with process which is irregular in form, or the full time allowed for appearing and answering is not given him, or the mode of service is irregular, he must generally object to such irregularity. If he fails to do so, and judgment is entered against him, it will usually not be treated as void when collaterally assailed.² When letters testamentary or of administration on the estate of deceased person, or of guardianship upon the person or estate of a lunatic or minor, are applied for, such measures as the statutes require must be taken for the purpose of obtaining jurisdiction over the persons interested. The statute may authorize the court to proceed without notice to any one. The proceeding may be *in rem*. But if notice is exacted by the statute, either by publication, or by the personal service of a citation, a substantial compliance with the statute is prerequisite to obtaining authority to proceed.³

§ 6. **Where the Judge is Disqualified from Acting.**— Sometimes a court has jurisdiction, both over the person and the subject-matter, but cannot proceed because the judge thereof is disqualified from acting in the particular case. If, however, he proceeds, when incompetent by statute, his judgment or order is, in most States, invalid.

¹ Cooper v. Reynolds, 10 Wall. 308; Galpin v. Page, 1 Cent. L. J. 491, 1 Sawy. 309, 18 Wall. 350; Freeman on Judgments, secs. 606 and 611.

² Freeman on Judgments, sec. 126; Hanks v. Neal, 44 Miss. 224; Stampley v. King, 51 Miss. 738; *Ex parte* Howard, etc., 1 Co., 119 Ala. 484, 72 Am. St. Rep. 928; Estate of Newman, 75 Cal. 213, 7 Am. St. Rep. 146; Griffith v. Harvester Co., 92 Iowa, 634, 54 Am. St. Rep. 573; Mitchell v. Aten, 37 Kan. 33, 1 Am. St. Rep. 231; Stafford v. Gallops, 123 N. C. 19, 68 Am. St. Rep. 815; Altman v. School District, 35 Or. 85, 76 Am. St. Rep. 468.

³ Randolph v. Bayue, 44 Cal. 370; Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 267.

For the purpose of trying or determining the particular matter, he is not a judge.¹

§ 7. **Suspension or Loss of Jurisdiction.**—A court or judge having authority to proceed at one time may be divested of jurisdiction, either temporarily or permanently. By the complete exercise of its jurisdiction to final judgment the court is precluded from again taking up the cause and while the first judgment remains in force proceeding to retry it and to enter another judgment.² The court may be abolished, or its jurisdiction may be divested by statute. The proceedings may be removed into some appellate tribunal. The term of the court may be adjourned *sine die*; in which case no judgment can be entered before the reopening of the court at its next term, unless expressly authorized by statute. During Sundays and other non-judicial days courts are generally without authority to act, and where such is the case judgments or orders entered by them are void.³ It is also ordinarily essential that a court be held at a place fixed by law, and whenever it appears that it was held at a place where it could not lawfully sit its proceedings are void.⁴ In all cases where a court is rendered incompetent to proceed, its proceedings during such incompetency are as invalid as though it had never possessed jurisdiction.⁵ If a probate court appoints an executor or administrator it cannot, while he continues in office, appoint another. Its jurisdiction is exhausted. Its further grant

¹ Freeman on Judgments, sec. 145; Keeler v. Stead, 56 Conn. 501, 7 Am. St. Rep. 320; Sigourney v. Sibley, 21 Pick. 101, 32 Am. Dec. 248; Coffin v. Cotile, 9 Pick. 287; Hall v. Thayer, 105 Mass. 219, 7 Am. Rep. 513; Gay v. Minot, 3 Cush. 352.

² Bank of Orland v. Dodson, 127 Cal. 208, 78 Am. St. Rep. 42.

³ City of Parsons v. Lindsay, 41 Kan. 336, 13 Am. St. Rep. 290; *Ex parte* White, 15 Nev. 146, 37 Am. Rep. 406; Styles v. Harrison, 99 Tenn. 128, 63 Am. St. Rep. 824.

⁴ Hilson v. Kitchens, 107 Ga. 230, 73 Am. St. Rep. 119.

⁵ Freeman on Judgments, sec. 121; *In re* Terrill, 52 Kan. 29, 39 Am. St. Rep. 327; *Ex parte* Ellis, 37 Tex. Cr. Rep. 539, 66 Am. St. Rep. 831.

of letters is void.¹ Neither can it appoint another administrator after an estate has been fully administered upon and distributed to the heirs.² A like result follows the removal of any subject-matter from the jurisdiction of the court, as where the result of a decree of partition is to place property beyond the jurisdiction of a probate court. Its subsequent sale under authority of that court is necessarily void.³ Where a statute forbade the administration upon the estates of persons who had been dead for more than twenty years, a grant of administration in defiance of the statute was adjudged void.⁴ If notice is given that a petition for the sale of lands will be presented at a time specified, and it is not then presented, the person interested in opposing it may regard it as abandoned. The court has no authority to hear it without giving a new notice.⁵ But if the failure to present the application arises from the fact that the term of court is not opened, no presumption of abandonment can be indulged. The petition may, it has been held, be presented at the next term without any new notice.⁶

The complete exercise of jurisdiction over a subject-matter may exhaust the jurisdiction, not only of the court so exercising it, but of another court possessing concurrent jurisdiction over the same subject-matter. Thus, if in the progress of the administration of an estate in the probate court of a county, certain lands of a decedent are authorized to be, and are sold, the sale confirmed, and a conveyance made to the purchaser, the jurisdiction of the court over such lands is clearly exhausted. They become

¹ *Griffith v. Frazier*, 8 Cranch, 9; *Flinn v. Chase*, 4 Den. 90.

² *Fisk v. Norvel*, 9 Tex. 13, 58 Am. Dec. 128.

³ *Wales v. Willard*, 2 Mass. 120.

⁴ *Turney v. Turney*, 24 Ill. 625; *Gibson v. Roll*, 30 Ill. 172, 83 Am. Dec. 181; *Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243. See also *Freeman on Judgments*, sec. 526.

⁵ *Hanks v. Neal*, 44 Miss. 224.

⁶ *Henderson v. Lindley*, 75 Tex. 185.

the property of the purchaser, and cannot again be subject to administration during the continuance of his life and ownership. If the district court of the county also possesses probate jurisdiction, and subsequently assumes authority over the estate of the same decedent, and orders the same lands to be sold, and they are in fact sold to a purchaser having no knowledge of the former proceedings, such sale is void, because the former sale completely exhausted all probate jurisdiction over the lands, and the latter sale was a mere unauthorized assumption of authority over the property of a living person.¹ The court may, without exhausting its jurisdiction, practically abdicate it and thus lose authority to pronounce a valid judgment. The instances where this will occur must be exceedingly rare. In *Windsor v. McVeigh*,² the record disclosed that after due service of process, and an appearance by defendant in response to such service, his appearance and answer were stricken from the files, and a decree entered against him. It was held that this action of the court was equivalent to recalling its process, and, therefore, to a condemnation without any opportunity to be heard; and that the decree was therefore *coram non judice* and void.

§ 7a. **Suspension or Loss of Right to Enforce Judgment or Order.**—If a judgment is satisfied, the right to issue execution, or to take further proceedings under a writ previously issued, undoubtedly terminates, and the weight of authority declares that every sale made after such satisfaction is void.³ This rule does not seem applicable to judicial sales which are reported to, and confirmed by, the court, for the reason that it would seem to be incumbent on the persons interested in the property sold to show, in opposition to the confirmation, that the judgment or

¹ *Lindsay v. Jaffray*, 55 Tex. 626; *Smith v. Woolfolk*, 115 U. S. 143.

² 93 U. S. 274; *Hovey v. Elliott*, 145 N. Y. 141, 167 U. S. 414.

³ *Knight v. Morrison*, 79 Ga. 55, 11 Am. St. Rep. 405; *Soukup v. Union I. Co.*, 84 Iowa, 448, 35 Am. St. Rep. 317; *Freeman on Executions*, sec. 19.

order under which the sale was made had been satisfied or had otherwise become inoperative. It has, nevertheless, been held in Pennsylvania that a sale of property by an administrator to pay a debt barred by the statute of limitations is void, though such statutory bar existed before the order of sale or of confirmation was made, and might, if properly interposed, have prevented the making of either.¹ The force of a judgment may be temporarily suspended by an appeal accompanied by an undertaking sufficient to stay further proceedings. In such case it might be well argued that if a defendant, notwithstanding the appeal and stay, permits plaintiff to take out execution and proceed to enforce it without making some motion or taking some proceeding in arrest of such action, an estoppel might arise against asserting his claim that the proceedings were void. The few decisions which have been made upon this subject, however, declare otherwise.² Hence if an executor proceeds to sell real property pending an appeal from the order authorizing such sale, his action is entirely unauthorized, and any sale or attempted conveyance made pursuant thereto is void.³ If an action is brought upon one judgment resulting in the recovery of another, it is not settled whether or not the second judgment operates as a satisfaction of the first and the termination of the right to further enforce it by execution.⁴ If the time within which a court is allowed to issue execution on a judgment has expired,⁵ or the right to maintain any action on such judgment has become barred by the statute of limitations,⁶ the writ subsequently issued is void.

¹ *Smith v. Wildman*, 178 Pa. St. 245, 56 Am. St. Rep. 760.

² *Bullard v. McArdle*, 98 Cal. 355, 35 Am. St. Rep. 176.

³ *Francis v. Daley*, 150 Mass. 381.

⁴ *Freeman on Executions*, sec. 19.

⁵ *Dorland v. Hanson*, 81 Cal. 202, 15 Am. St. Rep. 44; *Jacks v. Johnston*, 86 Cal. 384, 21 Am. St. Rep. 50; *Cortez v. Superior Ct.*, 86 Cal. 274, 21 Am. St. Rep. 37.

⁶ *Ludeman v. Hirth*, 96 Mich. 17, 35 Am. St. Rep. 588; *Coward v.*

It may be claimed that the power of the court to proceed with a cause over the subject-matter and the parties to which it once had conceded jurisdiction, absolutely terminates upon the death of the parties or of some of them. In our judgment this question should be determined by inquiring whether such death ends the power of the court to proceed, or merely requires it to take some action by way of substituting other parties in interest, and perhaps giving them notice of such substitution. If a minor or incompetent person dies while his estate is within the control of the court which has appointed a guardian thereof, we concede that such death necessarily terminates the authority of the court, except to settle the accounts of the guardian. It cannot continue its authority by substituting some representative or successor in interest in place of the decedent, and hence any further order it may make purporting to authorize the sale of his property must be void.¹ In ordinary cases, however, the power of the court to proceed to final judgment is not extinguished by the death of any of the parties, whether plaintiff or defendant, though it ought, before proceeding further after such death, bring before it his representative or successor in interest. The failure to do so is, in our judgment, a mere irregularity not affecting the jurisdiction of the court, and we are therefore of the opinion that if jurisdiction has been obtained of a person in his lifetime, neither the rendition nor entry of a judgment for or against him after his death is void,² but there is some dissent from this conclusion.³

Chastain, 99 N. C. 443, 6 Am. St. Rep. 533; Merchants' N. B. v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653; Freeman on Executions, § 27a.

¹ Alford v. Halbert, 74 Tex. 346.

² Cochrane v. Parker, 12 Colo. App. 169; Claflin v. Dunne, 129 Ill. 241, 16 Am. St. Rep. 263; Mitchell v. Schoonover, 16 Or. 211, 8 Am. St. Rep. 282; Watt v. Brookover, 35 W. Va. 323, 29 Am. St. Rep. 811; Metcalfe v. Hart, 3 Wyo. 513, 31 Am. St. Rep. 122; Freeman on Judgments, § 153.

³ Kager v. Vickery, 61 Kan. 342, 78 Am. St. Rep. 318; Kountz v. National T. Co., 197 Pa. 397; note to Watt v. Brookover, 29 Am. St. Rep. 816 to 819; Freeman on Judgments, § 153.

§ 8. **General Principles Governing Jurisdictional Inquiries.**—In attempting to decide whether a judicial, execution or probate sale can be avoided on the ground that the court entering the judgment or order of sale did not have jurisdiction over the person of the defendant, the first inquiry will be to ascertain whether the court was a court of general jurisdiction, or a court of special or limited jurisdiction, or, in other words, whether it is a court of record or one not of record. This inquiry must be conducted chiefly in the statutes of the State. If the court is a court of record this jurisdictional question can, in most States, be decided with comparative ease. Courts of record are presumed to act correctly. When a court of record has entered judgment its jurisdiction over the defendant is presumed, unless its record shows the contrary.¹ If, however, the record shows what was done toward acquiring jurisdiction, nothing else will be presumed to have been done,² and hence if from what appears by the record it is clear that jurisdiction is not established, the subsequent action of the court may be disregarded as void.³

An apparent exception to this rule arises when the return on the summons discloses an insufficient or void service, and the judgment or decree contains recitals or findings in favor of the jurisdiction of the court. In this case the recital or finding prevails. The court is presumed to have had other evidence than that contained in the return on the summons.⁴ This rule has been applied to the extent of sup-

¹ Freeman on Judgments, sec. 124; Cox v. Boyce, 152 Mo. 576, 75 Am. St. Rep. 483; Templeton v. Ferguson, 89 Tex. 47; Liams v. Root, 22 Tex. Civ. App. 413.

² Freeman on Judgments, sec. 125; Moore v. Starks, 1 Ohio St. 372; Benson v. Cilley, 8 Ohio St. 613.

³ Campbell v. Drais, 125 Cal. 253; Choate v. Spencer, 13 Mont. 127, 40 Am. St. Rep. 425; Wilkerson v. Schoonmaker, 77 Tex. 615, 19 Am. St. Rep. 803; Oelberman v. Ide, 93 Wis. 669, 57 Am. St. Rep. 947; O'Malley v. Fricke, 104 Wis. 280; Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 Am. St. Rep. 67; McGee v. Haynes, 127 Cal. 336, 78 Am. St. Rep. 57.

⁴ Freeman on Judgments, sec. 130.

porting the presumption that though the summons or other process shown by the record was void, its place had, at some subsequent time, been supplied by adequate process, when the record recited that "all of the defendants have been duly served with process or by publication in a newspaper, as the law requires, more than the lawful time prior to the sitting of the court, and the court doth find that this court has jurisdiction both of the parties defendant and complainant and the subject-matter of the suit."¹ In some of the States, however, if there is a return of the service of process, any recital in the judgment not stating the mode of service is considered as referring to such return, and if the service there shown is insufficient the judgment is treated as void.²

If the record states that the court acquired jurisdiction of the defendant, or even if it is silent on that subject, jurisdiction will always be presumed.³ In most States the presumption is conclusive,⁴ but in some a collateral attack may be made; and if, from such attack, it appears that the defendant was never brought before the court the judgment will be held void.⁵ In a majority of the States, if the proceeding is under some special statute and in derogation of the common law, the jurisdictional presumptions in favor of a court of record are not indulged. The inquiry must be conducted as though the court were not a court of

¹ *Bradley v. Drone*, 187 Ill. 175, 79 Am. St. Rep. 214.

² *Hobby v. Bunch*, 83 Ga. 1, 20 Am. St. Rep. 301.

³ *Freeman on Judgments*, secs. 131, 132, 134; *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 668; *Iiams v. Root*, 22 Tex. Civ. App. 413.

⁴ *White v. Simpson*, 124 Ala. 238; *Dyer v. Leach*, 91 Cal. 191, 25 Am. St. Rep. 171; *Brown v. Wilson*, 21 Colo. 309, 52 Am. St. Rep. 228; *Kingman v. Paulson*, 126 Ind. 507, 22 Am. St. Rep. 611, *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 669; *Hoagland v. Hoagland*, 19 Utah, 103; *Amy v. Amy*, 12 Utah, 310; *Williams v. Haynes*, 77 Tex. 282, 19 Am. St. Rep. 752; *Freeman on Judgments*, sec. 130.

⁵ *Freeman on Judgments*, sec. 133.

record.¹ If the court is one not of record, great care must be taken to ascertain that every act essential to jurisdiction has been performed,² and performed in a proper manner.³ No presumptions are indulged in favor of the jurisdiction of a court not of record. Its jurisdiction must always appear affirmatively.⁴ According to many of the authorities it must appear from the papers, files and proceedings in the case.⁵ On the other hand, the fact that these show jurisdiction is not conclusive. They are not records importing absolute verity. They may be contradicted.⁶ The courts having the administration of the estates of the deceased or of incompetent persons are, in some States, of general, and in others of limited or special, jurisdiction. Probably, in the majority of the States, they are of the latter class. Where this is the case, he who claims title under these courts must show affirmatively (and generally from their records and files) the taking of every step essential to jurisdiction.⁷ Nothing will be presumed in his favor. But in several of the States these courts are either courts of record, or are by statute placed on the same footing as courts of record, with reference to jurisdiction, and are presumed to have acquired jurisdiction over all parties in interest, except where their records and proceedings indicate the contrary.⁸

¹ *Id.*, secs. 123, 127; *Beckett v. Cuenin*, 15 Colo. 281, 22 Am. St. Rep. 399; *Laney v. Garbee*, 105 Mo. 305, 24 Am. St. Rep. 391; *Coffin v. Bell*, 22 Nev. 169, 58 Am. St. Rep. 738; *Willamette R. R. Co. v. Hendrix*, 28 Or. 485, 52 Am. St. Rep. 800.

² *Freeman on Judgments*, sec. 517.

³ *Freeman on Judgments*, sec. 521.

⁴ *Freeman on Judgments*, secs. 517, 527.

⁵ *Freeman on Judgments*, sec. 518.

⁶ *Freeman on Judgments*, sec. 517.

⁷ *Gwin v. McCarroll*, 1 S. & M. 351; *Rigney v. Coles*, 6 Bosw. 479; *Fell v. Young*, 63 Ill. 106; *Taylor v. Walker*, 1 Heisk. 734; *Gibbs v. Shaw*, 17 Wis. 201, 84 Am. Dec. 737; *Root v. McFerrin*, 37 Miss. 17, 75 Am. Dec. 49.

⁸ *Doe v. Bowen*, 8 Ind. 197, 65 Am. Dec. 758; *Gerrard v. Johnson*, 12

The presumption in favor of jurisdiction may go further than merely rendering unnecessary the proof of the service of notice or of process. An inspection of the papers remaining among the files of the court may not be rewarded by the discovery of any petition for the sale, or may disclose the fact that some other essential writing is not to be found. Where the court is deemed to be one of general jurisdiction, the presumption is indulged that the missing document originally existed and was sufficient in form, and that it has been lost from the files.¹ If a long period has elapsed between the date of a judicial or execution sale and the time when its validity is questioned, the presumption that the court and its officers did their duty is usually indulged, and the sale is upheld notwithstanding there is no direct or positive evidence of the existence of certain acts prescribed by law.²

ORDERS OF SALE IN PROBATE, AND HOW AUTHORITY TO MAKE
MUST BE OBTAINED.

§ 9. **Probate Sales without License of the Court; when Valid and when Void.**—In execution and chancery sales, jurisdictional inquiries need to be prosecuted with much less care and frequency than in the consideration of sales made by executors, administrators or guardians. In a suit in equity, or an action at law, if the complaint discloses a cause which the court was competent to entertain and de-

Ind. 636; Doe v. Harvey, 3 Ind. 104; Spaulding v. Baldwin, 31 Ind. 376; Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566; Tucker v. Harris, 13 Ga. 1, 58 Am. Dec. 488; Brown v. Redwyn, 16 Ga. 76; Wood v. Crawford, 18 Ga. 526; Davie v. McDaniel, 47 Ga. 200; Jones v. Edwards, 78 Ky. 6; Field v. Peebles, 180 Ill. 376; Templeton v. Ferguson, 89 Tex. 47.

¹ Doolittle v. Holton, 28 Vt. 819, 67 Am. Dec. 745; Hurley v. Barnard, 48 Tex. 83; Alexander's Heirs v. Maverick, 18 Tex. 179, 67 Am. Dec. 693.

² Seward v. Dideen, 16 Neb. 58, 20 N. W. Rep. 12; Whitman v. Fisher, 74 Ill. 147; Stevenson's Heirs v. McReary, 18 S. & M. 9, 51 Am. Dec. 102; Clark v. Hellis, 134 Ind. 421; Field v. Peebles, 180 Ill. 376; Cassell v. Joseph, 184 Ill. 378; Bray v. Adams, 114 Mo. 486.

cide, and the record shows that jurisdiction was obtained over the persons of the defendants, it is generally safe to forego all further jurisdictional inquiries. But in probate proceedings jurisdictional inquiries are material at almost every stage, and to be inattentive to them is to be guilty of rash imprudence. The application for letters testamentary, or of administration, the citation to the parties in interest, the hearing of the proofs and the order made thereon, correspond substantially to the complaint, the issue and service of process, and the trial and judgment at law. But here the case at law ends, while the case in probate is but scarcely commenced. What makes the probate proceeding still more perilous is, that a clear case of jurisdiction at this stage is not sufficient to support subsequent proceedings tending to divest the title of the heirs. At each subsequent stage, where the interest of the heir is sought to be affected, petitions and citations are usually exacted; and, in most courts, are treated as being jurisdictional in their nature.

In some circumstances an executor, administrator or guardian, may sell property without obtaining leave from the court. Where the statute has not adopted a different rule, "the whole personal estate of the testator or intestate rests in his executor or administrator;"¹ and "an executor or an administrator has an absolute power of disposal over the whole personal effects of the testator or intestate, and they cannot be followed by creditors, much less by legatees, either general or special, into the hands of an alienee. The principle is, that the executor or administrator, in many instances, must sell in order to perform his duty in paying debts, etc., and no one would deal with him if liable afterwards to be called to an account."² Interests in real prop-

¹ Lomax on Executors (2d Ed.), 367; *Goodwin v. Jones*, 3 Mass. 518, 3 Am. Dec. 173; *Hayes v. Jackson*, 6 Mass. 152; *Sneed v. Hooper*, Cooke, 200, 5 Am. Dec. 691; *Petrie v. Clark*, 11 S. & R. 377, 14 Am. Dec. 636, and note.

² Lomax on Executors (2d Ed.), 560; *Peterson v. Chemical Bank*, 32

erty less than freehold could, by the common law, be disposed of by an executor or administrator to the same extent as other chattel interests.¹ When the power of an executor or administrator to dispose of personal effects of the testator or intestate is spoken of as absolute, it is not intended to assert that its exercise can, under no circumstances, be questioned. Where the disposition is in bad faith, or for an unauthorized purpose, the executor or administrator may, by proper proceedings, be held answerable to those injured thereby.² If, however, he is chargeable with notice that the disposition was for an improper purpose, he may doubtless, if necessary, be held accountable for the property. It is true there are decisions treating such sales as void, and sustaining a recovery of the property from the transferee.³ By the common law, however, we think that such sales were never void in the proper sense of that term, and that the remedy of heirs, legatees, and others entitled to complain thereof, was restricted to suits in equity.⁴

Where the common-law rules upon the subject still prevail, a guardian, though not vested with any estate in the

N. Y. 21. 88 Am. Dec. 293; *Overfield v. Bullitt*, 1 Mo. 749; *Williamson v. Branch Bank*, 7 Ala. 906; *Bland v. Muncaster*, 24 Miss. 62, 57 Am. Dec. 162; *Nugent v. Gifford*, 1 Atk. 463; *Jelke v. Goldsmith*, 54 Ohio St. 499, 49 Am. St. Rep. 730; *Grimes v. Pennsylvania R. R. Co.*, 189 Pa. 619, 66 Am. St. Rep. 830; *Heming v. Hawkins*, 102 Wis. 56, 72 Am. St. Rep. 863. An administrator may sell, without an order of court, a term of 999 years, for that is personalty (*Petition of Gay*, 5 Mass. 419); but not the estate of a mortgagee, for that is realty. *Ex parte Blair*, 13 Met. 126.

¹ *Amory v. Francis*, 16 Mass. 308; *Billingham v. Jenkins*, 7 Sm. & M. 479; *Schouler's Executor and Administrator*, § 353.

² *Field v. Schieffelin*, 7 Johns. Ch. 150, 11 Am. Dec. 441; *Thomas v. White*, 3 Litt. 177, 14 Am. Dec. 56.

³ *Luke v. Marshall*, 5 J. J. Marsh. 353; *Clark v. Coe*, 52 Hun, 379, 5 N. Y. Supp. 243; *Warren v. Union Bank*, 157 N. Y. 259, 68 Am. St. Rep. 777.

⁴ *Schouler's Ex. & Ad.*, §§ 359, 360; *Hagthorp v. Neale*, 7 Gill & J. 13, 26 Am. Dec. 594; *Herron v. Marshall*, 5 Humph. 443, 42 Am. Dec. 444.

personal property of his ward, has an ample power of disposition over it. "Though it be not in the ordinary course of the guardian's administration to sell the personal property of his ward, yet he has the legal right to do it, for it is entirely under his control and management, and he is not obliged to apply to court for direction in every particular case. The question as to the due exercise of the power arises between the guardian and his ward; and I apprehend that no doubt can be entertained as to the competency of the guardian's power over the disposition of the personal estate, including the choses in action, as between him and a *bona fide* purchaser."¹

Executors may, at the common law and under the statutes of most of our States, sell real estate devised to them or over which the will give them a power of sale.² Nor need this power of sale be conferred in express terms. It must be inferred when the testator directs his real estate to be sold, without declaring by whom the sale shall be made, that he intended the power to be exercised by his executor, if the proceeds of the sale are by the provisions of the will or by the rules of law to be distributed or paid out by such executor.³ And generally where a testator imposes upon his executor trusts to be executed or duties to be performed which cannot be executed nor performed without an estate in his lands or a power of sale, although no estate or power is given expressly by the will, the executor takes, by implication, an estate in the lands, or at least a power

¹ Field v. Schieffelin, 7 Johns. Ch. 153, 11 Am. Dec. 441; Tuttle v. Heavy, 50 Barb. 334; Tyler on Infancy and Coverture, 261-2; Thompson v. Boardman, 1 Vt. 367, 18 Am. Dec. 684; Truss v. Old, 6 Rand. 556, 18 Am. Dec. 784.

² Lomax on Executors (2d Ed.), 384, 402, 560, and authorities in the next two citations; Munson v. Cole, 98 Ind. 502; Magruder v. Peter, 11 Gill & J. 217; Brooks v. Bergner, 83 Md. 352; Rogers v. Jones 13 Tex. Civ. App. 453.

³ Davis v. Hoover, 112 Ind. 423; Rankin v. Rankin, 36 Ill. 293, 87 Am. Dec. 205, and note.

sufficient to enable him to execute the trusts or perform the duties imposed upon him, and in either event he may convey the legal title.¹ A mere direction, however, to an executor to pay debts, or a charging them upon lands, does not create a power of sale which may be exercised by him.²

In Minnesota it has been held that an executor under a foreign will who has qualified at the foreign domicile may, subject to the interests of local creditors, exercise a power of sale conferred by the will, and that this sale must be regarded as valid when the will is also admitted to probate in the State of Minnesota.³ We think that the more correct view of this subject, however, is that "so far as concerns the realty, a will, beyond the jurisdiction where it is probated, is inoperative and has no extraterritorial force or validity; and the executor of such will cannot, because of his appointment in accordance with the laws of one State, thereby acquire authority to sue for, or in any manner intermeddle with, the property or effects of his testator, whether real or personal, in another State, unless the will be there proven, or the laws of such State, dispensing with the probate anew, confer the requisite permission."⁴

A sale may be made by an executor assuming to exercise the power conferred by the will when the will does not confer such power, or does not confer it to be exercised for the purposes for which the sale was made. Necessarily the purchaser must take notice of the terms of the will, and if they fail to create any power the sale must be absolutely

¹ Davis v. Hoover, 112 Ind. 423; Lindley v. O'Reilley, 50 N. J. Law, 636, 7 Am. St. Rep. 802.

² Williams v. Williams, 49 Ala. 439; Hill v. Den, 54 Cal. 6; Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232; *In re Fox*, 52 N. Y. 530, 11 Am. Rep. 751; Worley v. Taylor, 21 Or. 589, 28 Am. St. Rep. 771.

³ Babcock v. Collins, 60 Minn. 73, 51 Am. St. Rep. 503.

⁴ Cabbane v. Skinner, 56 Mo. 367; Emmons v. Gordon, 140 Mo. 490, 62 Am. St. Rep. 734.

void.¹ So though a power of sale is created by the will, it can be exercised only upon the conditions and for the purposes therein stated, and if the purchaser is chargeable with notice that it has been attempted to be exercised for some other purpose or upon some other condition, the executor's conveyance to him can transfer no title.² It has been said that when the will authorizes an executor to sell lands for the sole purpose of paying debts, the purchaser must show that debts then existed;³ but the better rule is that one purchasing under a power in a will has the right to presume that the executor is acting in good faith,⁴ and is not bound to examine the accounts for the purpose of determining whether a necessity existed for the exercise of the power;⁵ nor is he bound after the sale to see to the proper application of the purchase money.⁶

The power of a testator to authorize his executor to sell his real or personal estate without applying to court for permission is generally conceded, though in some of the States such sales must be reported to and approved by the court.⁷ The nomination of certain persons as executors, and investing them with power to sell the testator's real estate at their discretion, and without any license from the

¹ *Huse v. Den*, 85 Cal. 390, 20 Am. St. Rep. 232; *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560; *Gay v. Grant*, 101 N. C. 206.

² *In re McComb*, 117 N. Y. 378; *Smith v. Henning*, 10 W. Va. 596.

³ *McCown v. Terrell*, 9 Tex. Civ. App. 66.

⁴ *Davis v. Christian*, 15 Gratt. 1.

⁵ *Wright v. Zeigler*, 1 Kelly, 324; *Rutherford's Heirs v. Clark's Heirs*, 4 Bush, 27; *Holman v. McKinney*, 3 J. J. Marsh. 246; *Scudder v. Stout*, 10 N. J. Eq. 327; *Hemmy v. Hawkins*, 102 Wis. 56, 72 Am. St. Rep. 863.

⁶ *Munson v. Cole*, 98 Ind. 502; *Hughes v. Tabl*, 78 Iowa, 315; *Seldner v. McCreery*, 78 Md. 287; *Barnes v. Trenton G. L. Co.*, 27 N. J. Eq. 23; *Meeks v. Thompson*, 8 Gratt. 34, 56 Am. Dec. 134; *Davis v. Christian*, 15 Gratt. 1.

⁷ *Delaney's Estate*, 49 Cal. 77; *Jackson v. Williams*, 50 Ga. 553; *Durham's Estate*, 49 Cal. 491; *Crusoe v. Butler*, 36 Miss. 170; *Bartlett v. Sutherland*, 24 Miss. 395; *Going v. Emery*, 16 Pick. 107, 26 Am. Dec. 645; *Payne v. Payne*, 18 Cal. 291; *Larco v. Casaneuava*, 30 Cal. 567; Cal. Code C. P., § 1561; *Ogle v. Reynolds*, 75 Md. 145.

court, indicates that the testator has unusual confidence in the fidelity and sagacity of the persons so nominated and empowered. This unusual and somewhat irresponsible authority may, in the judgment of the testator, be safely and even advantageously conferred on the executors named in the will, but it is hardly probable that he would wish to see any other persons invested with it. Hence, where persons named as executors and invested with powers of sale have declined, or been unable to act, it has been held that the special confidence reposed in them by the will could not be vested in any other person, and that the administrator with the will annexed had no power to make sales, except by permission of the court.¹ That, in some cases, a power of sale, vested by the will in an executor, does not, in the event of his death, resignation or failure to qualify, vest in the administrator with the will annexed is established by a very decided preponderance of the authorities, and is perhaps not necessarily inconsistent with any of the cases. If the executor is merely invested with a discretion to sell if he thinks best so to do, this discretionary power cannot be exercised by an administrator with the will annexed.² If, on the other hand, executors are directed to sell, so that it would be impossible to accomplish the designs of their testator otherwise than by sale, it is quite clear that he did not choose them for the purpose of having the benefit of their judgment in determining whether or not there should be any sale; and there seems to be no reason why his direction to sell may not be executed by part of his executors if some

¹ *Nicoll v. Scott*, 99 Ill. 529; *Penn v. Folger*, 77 Ill. App. 365; *Tippett v. Mize*, 30 Tex. 361, 94 Am. Dec. 314; *Brown v. Hobson*, 3 A. K. Marsh. 380, 13 Am. Dec. 187; *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97; *Conklin v. Edgerton*, 21 Wend. 430; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293; *Cooke v. Platt*, 98 N. Y. 35.

² See authorities in preceding citation. *Bigelow v. Cady*, 171 Ill. 229, 63 Am. St. Rep. 230; *Gambell v. Trippe*, 75 Md. 252, 32 Am. St. Rep. 388; *Sites v. Eldredge*, 45 N. J. Eq. 632, 14 Am. St. Rep. 769; note to *Crouse v. Peterson*, 80 Am. St. Rep. 96 to 123.

of them fail to qualify, or, after qualifying, from any cause become incompetent to act,¹ or by an administrator with the will annexed, in case all the executors should resign or become disqualified or unable to act.²

Except where authorized to do so by a will, or by some statute, neither an administrator, an executor, nor a guardian can sell real estate without a license or order of sale from the court. A sale made without such license or order of court is not a mere error or irregularity which must be objected to by some proceeding in the court where the license ought to have been sought and granted; and, which, if not so objected to, is waived or ratified. It is a proceeding without any legal support. A conveyance made in pursuance of it has no force whatever. It may be shown to be void when collaterally attacked. In fact, no attack, collateral or otherwise, need be made.³ The claimant under the sale could not show a *prima facie* case. In many of the States the power of guardians, executors and administrators over personal property does not extend to its transfer without leave of the court. An attempted transfer

¹ Taylor v. Galloway, 1 Ohio, 232, 13 Am. Dec. 605; Zebach v. Smith, 3 Bin. 69, 5 Am. Dec. 352; Marr v. Peay, 2 Murph. 84, 5 Am. Dec. 521; Nelson v. Carrington, 4 Munf. 332, 6 Am. Dec. 519; note to Crouse v. Peterson, 80 Am. St. Rep. 96 to 123.

² Peebles v. Watts' Admr., 9 Dana, 103, 33 Am. Dec. 531; Kidwell v. Brummagim, 32 Cal. 438; Steele's Ex. v. Moxley, 9 Dana, 139; Gulley v. Prather, 7 Bush, 167; Gaines v. Fenter, 82 Mo. 497; Bailey v. Brown, 9 R. I. 79; Brown v. Armistead, 6 Rand. 594; Evans v. Chew, 71 Pa. St. 47; Mott v. Ackerman, 92 N. Y. 539; Sandifer v. Grantham, 62 Miss. 412.

³ Tippet v. Mize, 30 Tex. 361; Beard v. Rowan, 1 McLean, 135; Robinson v. Martel, 11 Tex. 149; Low v. Purdy, 2 Lans. 422; Anderson v. Turner, 3 A. K. Marsh. 131; French v. Currier, 47 N. H. 88; Hite v. Taylor, 3 A. K. Marsh. 353; Goforth v. Longworth, 4 Ohio, 129, 19 Am. Dec. 588; Jackson v. Todd, 1 Dutch. 121; Gelstrop v. Moore, 26 Miss. 206, 59 Am. Dec. 254; Bell's Appeal, 66 Pa. St. 498; Evans v. Snyder, 64 Mo. 516; Walbridge v. Day, 31 Ill. 379, 83 Am. Dec. 227; Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232; Frost v. Atwood, 73 Mich. 67, 16 Am. St. Rep. 560; Bartley's Heirs v. Harris, 70 Tex. 181; Gay v. Grant, 101 N. C. 206; Tait v. Norton, 94 U. S. 746.

made without such leave is, in such States, void.¹ It has been held, however, that a statute authorizing an administrator to apply for and obtain an order authorizing his sale of personal property is not restrictive, and does not deprive him of his common-law authority to make sales without first seeking the direction of the court.²

§ 9a. **What Property may be Subject to an Effective Executor's or Administrator's Sale** must be ascertained by consulting the statute under which it is claimed to have been authorized. The general policy of the statutes upon the subject is to authorize sales of all the property of decedents in which they had any beneficial interest without regard to the character either of the property or of their interest therein.³ The interest must, however, as is already suggested, be beneficial. Hence, if a decedent held it merely as a trustee for another, its sale by his executor or administrator is not authorized,⁴ and if it were held by the decedent partly in his own right and partly in trust, the effect of the sale must be restricted to his beneficial interest.⁵ The property, whether real or personal, may be situate in any part of the State, for a court which has jurisdiction to grant letters testamentary or of administration within a State is usually given authority over all the property of the decedent therein, and hence may authorize the sale thereof though it is situate in another county or dis-

¹ *Kendall v. Miller*, 9 Cal. 591; *De La Montagnie v. Union Ins. Co.*, 42 Cal. 291; *Wells v. Chaffin*, 60 Ga. 677; *Estate of Radovich*, 74 Cal. 536, 5 Am. St. Rep. 466; *Citizens' etc., Co. v. Robbins*, 128 Ind. 449, 25 Am. St. Rep. 445; *Wilkinson v. Ward*, 42 Ill. App. 541; *Hull v. Clark*, 14 Sm. & M. 187; *Rhame v. Lewis*, 13 Rich. Eq. 269. Where there is a valid order of sale, the sale of any parcel of land, in addition to the lands described in such order, is without any authority of law, and is, therefore, absolutely void. *Burbank v. Semmes*, 99 U. S. 138.

² *Newell v. West*, 13 Blatch. 114.

³ *Spence v. Parker*, 57 Ala. 196.

⁴ *Newell v. Montgomery*, 30 Ill. App. 48, 129 Ill. 58.

⁵ *Appeal of McCormick*, 57 Pa. St. 54, 98 Am. Dec. 191.

trict.¹ On the other hand, it is not essential that the estate of the decedent be one recognized by law. It may be an equitable estate merely.² Though the law of the State prohibits the sale of lands adversely held, the inhibition does not, it is believed, apply to sales by executors or administrators.³

A conveyance made for the purpose of hindering, delaying or defrauding the creditors of the grantor may by them, for most purposes, be treated as void. Hence they may proceed under a writ against the grantor to levy upon and sell such property as if no conveyance thereof had been attempted, and the purchaser at an execution sale acquires the legal title.⁴ An executor or administrator represents the creditors of the decedent, and may, in a majority of the States, maintain suits to vacate fraudulent transfers made by the decedent when such vacation is essential to the protection of his creditors;⁵ but we think an executor or administrator cannot treat such transfers as void, and by selling the property in disregard thereof vest the purchaser with the legal or any title thereto.⁶ In some of the States, however, an executor or administrator is by statute authorized to sell lands fraudulently transferred by a decedent, and may either sue for their recovery or, without such suit, make a sale thereof, and vest his rights in the purchaser.⁷

¹ *Gordon v. Howell*, 35 Ark. 381; *Vail v. Rinehart*, 105 Ind. 6; *Van Horn v. Ford*, 16 Iowa, 578; *Land v. Nelson*, 79 Pa. St. 407.

² *Evans v. Matthews*, 8 Ala. 99; *Valle v. Bryan*, 19 Mo. 423; *Biggs v. Bickel*, 12 Ohio St. 49; *Appeal of Horner*, 56 Pa. St. 405.

³ *Herbert v. Herbert*, Breese, 354, 12 Am. Dec. 192; *Mercier v. Sterling*, 5 La. 472; *Knowles v. Blodgett*, 15 R. I. 463, 2 Am. St. Rep. 913. *Contra*: *Weitman v. Thiot*, 64 Ga. 11; *Hall v. Armor*, 68 Ga. 449; *Libby v. Christy*, 1 Red. Sur. 465.

⁴ *Freeman on Executions*, § 136.

⁵ *Freeman on Executions*, § 431.

⁶ *Bottorff v. Covert*, 90 Ind. 508; *Hall v. Callahan*, 66 Mo. 316; *Spoors v. Coen*, 44 Ohio St. 497.

⁷ *Brown v. Whitmore*, 71 Me. 65; *Tenny v. Poor*, 14 Gray, 500, 77 Am. Dec. 340; *McLane v. Johnson*, 43 Vt. 48.

Unless an exception is created by statute, as in the case of property fraudulently transferred by the decedent, it may be safely affirmed that an executor's or administrator's sale cannot transfer any title to property not vested in the decedent at the time of his death. Perhaps a further exception should be indulged when, though the decedent did not have any title at the time of his death, yet it has, because of some right in him, been transferred after such death to his personal representative. It has been held, however, in Alabama, when a sale is made for the purpose of distribution, that the power of the probate court extends "only to the title or estate as it descended, and not to an after-acquired title different and distinct from that which the intestate had at the time of his death."¹ Where a pre-emptioner or other person having some inchoate right in public lands dies before it is perfected, and his heirs are given the right to take measures which will result in the issuing of a patent or other evidence of title to them, there is doubt whether the interest of the heirs is subject to disposition under any circumstances by the executor or administrator, and the weight of authority, in our opinion, favors the proposition that such lands are no part of the estate of the decedent, and that any attempted sale thereof by his personal representative, though apparently authorized by the court, is void.²

If property of any class is exempt from execution and forced sale, and such exemption continues notwithstanding the death of its owner, it must be erroneous for any court to order its sale for the payment of his debts. The most

¹ Jones v. Woodstock L. Co., 95 Ala. 551.

² Burns v. Hamilton, 33 Ala. 210, 70 Am. Dec. 570; Hartley v. Brown, 46 Cal. 201; Rogers v. Clemmans, 26 Kan. 522; Coulson v. King, 42 Kan. 507, 16 Am. St. Rep. 503; Delay v. Chapman, 3 Or. 459. *Contra*: Moore's Ad. v. Moore's Heirs, 11 Humph. 512; Soye v. Maverick, 18 Tex. 100; Lyne v. Sandford, 82 Tex. 58, 27 Am. St. Rep. 852; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32.

familiar instance of such exemption exists in the case of homesteads, the sale of which is either wholly prohibited or is restricted to sales in payment of liabilities incurred prior to the impressing of the homestead character upon the lands in question. It is scarcely necessary to observe that a decree directing the sale of a homestead, other than in a case specially authorized by statute, is erroneous.¹ Whether it is void presents a more difficult question. There may be doubt whether a parcel of real property is a homestead, or, if it be a homestead, whether it is not subject to sale in satisfaction of a liability existing before its dedication, and we know of no reason why either of these questions may not be presented for consideration to the court before which a petition for sale is pending and there litigated and decided upon the merits, nor, if so decided, why the order directing the sale of the homestead is not conclusive upon all the interested parties before the court.² Thus, in *Ions v. Harbison*,³ where it was contended that property sold by order of the probate court was a homestead, and that the court therefore "had no jurisdiction of the subject-matter administered upon," it responded that the code of the State declared it to be the duty of the court, if the homestead had been selected and recorded prior to the death of the decedent and was returned in the inventory, appraised at not exceeding five thousand dollars, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, by its order to set it over to the persons in whom the title had vested; and the court inferred therefrom that "it is therefore clear that the court has jurisdiction over the homestead for some purposes; and it seems to follow that if the court, from ignorance of the fact that it was a

¹ *Hartman v. Schultz*, 101 Ill. 437; *Oettinger v. Specht*, 162 Ill. 179; *Cain v. Young*, 1 Utah, 361.

² *Sigmond v. Bebbber*, 104 Iowa, 431.

³ 112 Cal. 260.

homestead, or by inadvertance or mistake of law made an order not authorized by the statute, its proceedings, however erroneous, would not be without jurisdiction, and hence would be valid against a collateral attack. Indeed, the record of the probate proceedings does not disclose the fact that there ever was a declaration of homestead, and therefore, upon the face of the record, the superior court had jurisdiction. It follows that if the administrator, having failed to disclose his interest in the property under the declaration of homestead, had appealed to this court upon the record of that case, assuming that all other proceedings were sufficient, the jurisdiction of that court must have been affirmed; and, if so, he could not now question it." The action in which this language was used was one to quiet title brought against a purchaser at an administrator's sale by the successor in interest of the administrator who sold the land. The property in question had belonged to his wife who, previously to her death, had first executed a mortgage upon the property, and then filed a declaration of homestead in due form of law. Her husband, after receiving his appointment as her administrator, filed an inventory of the property of the estate, in which the premises in controversy were described, and soon thereafter he petitioned the court for an order to sell them for the purpose of paying the mortgage debt thereon and certain expenses of administration. The order of sale was granted, the land sold, and the sale reported to, and confirmed by the court. After executing his conveyance as administrator, the husband, for a nominal consideration, conveyed his interest in the property to the plaintiff, and the court, in addition to resting its decision upon the grounds already stated, further declared that even if it were conceded that the court had no jurisdiction and that the sale was void, both the administrator and the plaintiff claiming under him, from the disclosed facts of which both had knowledge, must be held estopped from questioning the purchaser's

title. The decisions in the other States upon this subject, while they have not met the question very fairly, certainly tend to sustain the conclusion that an administrator's or executor's sale of a homestead will be held void in a collateral proceeding, unless it is there affirmatively shown that the debt for the payment of which the sale was decreed was contracted before the homestead right was acquired, or that the question of the liability of the property to sale had been presented to, and considered by, the court authorizing it to be made.¹

§ 96. **The Time Within Which the Petition May be Presented and Properly Granted** may be considered with respect (1) to the cause upon which it is founded, and (2) to express or implied limitations upon the power of the court to proceed unless the petition is presented within some time specified, either after the granting of letters testamentary or of administration, or of the accrual of the right to insist upon the sale of the property. The debts for the payment of which a sale of the property, whether real or personal, is sought may be barred by the statute of limitations. If so, we apprehend that this fact should be presented by the parties in interest or by the court upon its own motion as a reason for denying the sale, and if not so presented, or if presented and erroneously overruled, the action of the court in directing the sale is not without or in excess of its jurisdiction, and its order cannot be treated as void.² If a claim against a decedent is presented to, and allowed by, his executor or administrator and the court having jurisdiction of his estate, it cannot thereafter, properly speaking, become barred by the statute of limitations, because such allowance has accomplished all that could re-

¹ Kessinger v. Wilson, 53 Ark. 400, 22 Am. St. Rep. 220; Bond v. Montgomery, 56 Ark. 563, 35 Am. St. Rep. 119; Kelsay v. Frazier, 78 Mo. 111; Daudt v. Harman, 16 Mo. App. 203; Murphy v. De France, 105 Mo. 53; Howe v. McGivern, 25 Wis. 525.

² Cobb v. Garner, 105 Ala. 467, 53 Am. St. Rep. 136.

sult from a suit and a judgment therein in favor of the creditor.¹ There is no doubt, however, that though no statute of limitations has interposed, a creditor may be guilty of such laches as will justify, or even require, the court to deny his application for the sale of the property for the purpose of paying his demand.² The question of laches does not, in our judgment, go to the jurisdiction of the court, for the reason that apparent laches are always susceptible of explanation,³ though in one instance it was held that a delay of twenty-seven years was so extreme that an order of sale thereafter made should, in the absence of explanation, be regarded as void.⁴ A statute may clearly limit the power of the court by restricting its authority to grant a license to sell to those cases in which debts have been proved and allowed, or a petition for a sale filed within a time specified. An examination of the records and files of the court must, where such statutes are in force, reveal, if such be the fact, that the petition was not based upon a cause, or filed within the time allowed, and it may be that the action of the court, if it nevertheless directs a sale, may properly be regarded as void.⁵

§ 10. **Petition for Order of Sale must be by a Person Competent to Present it.**—We now pass to the most numerous class of probate sales—those which must be sanctioned by a pre-existing order of court. This order

¹ *In re Arguello's Estate*, 85 Cal. 151.

² *Brogan v. Brogan*, 63 Ark. 405, 58 Am. St. Rep. 124; *In re Crosby's Estate*, 55 Cal. 574; *In re Arguello's Estate*, 85 Cal. 151; *Reed v. Colby*, 89 Ill. 104; *McKean v. Vick*, 108 Ill. 373; *Wingerter v. Wingerter*, 71 Cal. 105; *McCrary v. Tasker*, 41 Iowa, 255; *State v. Probate Court*, 40 Minn. 296; *Ferguson v. Scott*, 49 Miss. 50; *Hatch v. Kelly*, 63 N. H. 29; *Gregory v. Rhoden*, 29 S. C. 90; note to *Killough v. Hinton*, 26 Am. St. Rep. 22-29.

³ *Macey v. Stark*, 116 Mo. 481; *Barlow v. Clark*, 67 Mo. App. 340.

⁴ *Langworthy v. Baker*, 23 Ill. 484.

⁵ *Tarbell v. Parker*, 106 Mass. 347; *Edmunds v. Rockwell*, 125 Mass. 363; *Hoffman v. Beard*, 32 Mich. 218; *Slocum v. English*, 4 Thomp. & C. 266, affirmed 62 N. Y. 494.

must, in turn, be supported by certain pre-existing facts. In truth, the order of sale bears more resemblance to a judgment obtained in a new action, than to an order made in a pre-existing proceeding in which jurisdiction has already been acquired. To obtain an order of sale, a petition or complaint must be filed, a citation or notice must be issued and served, and a complete adversary proceeding conducted. Any jurisdictional defects in this proceeding are as fatal as if connected with the original grant of administration. And, what is worse, defects which, in actions at law, would be treated as mere errors, are, in probate proceedings, counted as incurable jurisdictional infirmities. If a complaint in an action at law, or in a suit in equity, does not state facts sufficient to entitle the complainant to relief, its deficiency must be pointed out, or a judgment or decree is likely to be entered, which, though reversible on appeal, is valid until so reversed. If the complaint were filed by some one having no capacity to maintain the suit or action, that incapacity would be called to the attention of the court in some manner; or, if that were not done, a judgment would probably be entered in favor of plaintiff, and this judgment would not be void. But the presentation of a petition in probate by a person authorized to so petition, has often been held to be a jurisdictional fact. If it be presented by some one not qualified to present it, there is no jurisdiction—no power to hear and determine it. If the court erroneously grants the prayer of the petition there need be no appeal—the order is void and cannot support a sale.¹ In the application of this supposed rule some extreme and, in our judgment, absurd decisions have been made. Thus, it has been affirmed that if the petition for the appointment of an administrator shows that the applicant is not one of the persons to whom administration should be granted, the

¹ Miller v. Miller, 10 Tex. 319; Washington v. McCaughan, 34 Miss 304.

court has no authority to proceed, and that its subsequent grant of letters of administration as prayed for in the petition, and all orders of sale, and sales made as a result thereof, are absolutely void.¹ In defense of these decisions it may perhaps be said that an inspection of the petition or other papers on file in the estate must show to intending purchasers the erroneous action of the court, and hence deprive them of the claim of being purchasers without notice of the defects, on account of which the proceedings are claimed to be void. In New York, however, it has been held that there is no authority to appoint a minor to the office of executrix, and that, though the minor appointed was the widow of the decedent, and neither the petition nor any other paper in the estate disclosed, or was required to disclose, her age, still that her appointment and all subsequent proceedings by her, though sanctioned by the order of the court, were void.² In a case in the Supreme Court of the United States it was insisted that a grant of administration and an order of sale based on it were void, because no one was entitled to letters of administration except the public administrator, and that the grant thereof to another person was unauthorized and void, but that court was of the opinion that the court before which the petition was preferred, having jurisdiction of the estate of the decedent, was competent to determine all matters arising therein, and that an incorrect determination was at most an error to be corrected only by appeal or some like proceeding, and quoted as applicable to the case before it, the following from the opinion of Mr. Justice Field in *Comstock v. Crawford*:³ "It is well settled that when the jurisdiction of a court of limited and special authority

¹ *Haug v. Primeau*, 98 Mich. 91; *Templeton v. Falls L. & C. Co.*, 77 Tex. 55.

² *Continental T. Co. v. Nobel*, 30 N. Y. Supp. 994; *Knox v. Nobel*, 27 N. Y. Supp. 206, 28 N. Y. Supp. 355, 77 Hun, 232.

³ 3 Wall. 403.

appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority. * * * Whether there was a widow of the deceased, or next of kin, or creditor, who was a proper person to receive letters, if he had applied for them, or whether there was any public administrator in office authorized or fit to take charge of the estate, or to which of these several parties it was meet that the administration should be granted, were matters for the consideration and determination of the court; and its action respecting them, however irregular, cannot be impeached collaterally."¹

In the case of two or more acting executors or administrators, a petition for an order of sale, preferred by any less than the whole, is irregular, but probably is not so worthless that the court can base no valid action upon it.² If the petition is by a person acting as administrator, but who has never qualified as such,³ or is a special administrator not authorized by law to present the petition or make the sale,⁴ or it appears from the whole record of the probate proceedings that his appointment was illegal, then the license and the sale based thereon are both void.⁵ We

¹ *Simmons v. Saul*, 138 U. S. 439.

² *Fitch v. Witbeck*, 2 Barb. Ch. 161; *Gregory v. McPherson*, 13 Cal. 578; *Downing v. Rugar*, 21 Wend. 178, 34 Am. Dec. 223; *Stowe v. Banks*, 123 Mo. 672; *Melins v. Pfister*, 59 Wis. 186. See, as sustaining petitions by one administrator only, *Jackson v. Robinson*, 4 Wend. 437; *De Bardelaben v. Stoudenmire*, 48 Ala. 643.

³ *Pryor v. Downey*, 50 Cal. 389, 19 Am. Rep. 650.

⁴ *Long v. Burnett*, 13 Iowa, 28, 81 Am. Dec. 410.

⁵ *Frederick v. Pacquette*, 19 Wis. 541; *Sitzman v. Pacquette*, 13 Wis. 291; *Chase v. Ross*, 36 Wis. 267; *Sumner v. Parker*, 7 Mass. 79; *Withers v. Patterson*, 27 Tex. 501, 86 Am. Dec. 643; *Ex parte Barker*, 2 Leigh, 719; *Miller v. Jones*, 26 Ala. 247; *Allen v. Kellam*, 69 Ala. 442; *Dooley v. Bell*, 87 Ga. 74; *Bell v. Love*, 72 Ga. 125; *Callahan v. Fluker*, 49 La. Ann. 237; *Haug v. Primeau*, 98 Mich. 91; *Templeton v. Falls L. & C. Co.*, 77 Tex. 55. See *ante*, sec. 2.

believe, however, that the true subject of inquiry must be, not whether the appointment of the executor or administrator was erroneous or irregular or his qualification as such omitted or inadequate, but whether, when the petition for the order of sale was granted, the court had jurisdiction over the estate.¹ If there never was any attempted grant of administration or of guardianship, or though attempted, it was void, the court may still properly be regarded as not having acquired jurisdiction of the estate of the decedent or minor, and if so, jurisdiction is not vested in it from the presentation of the petition for leave to sell property.² If, on the other hand, there has been a valid grant of administration or guardianship, the court has jurisdiction to consider and to dispose of every subsequent application made to it for the sale of the property, whether by a person whom it ought to hear upon the subject or not. Hence, where an order of sale has been granted, it cannot be held void because the petition should have been by creditors or legatees instead of by an administrator or executor in their behalf,³ or because a guardian who petitioned on behalf of a minor was executor of the estate, and therefore should not have been appointed guardian.⁴ On the same principle, where there has been a valid grant of letters of administration and a subsequent removal and the appointment of an administrator *de bonis non*, who procured an order of sale, it cannot be collaterally attacked on the ground that such removal was void or unauthorized. If the petition avers the appointment of an administrator *de bonis non*, the granting of the order of sale is a judicial determination that he is the personal representative, "for without such determination the order could not have been granted," and

¹ Comstock v. Crawford, 3 Wall. 403; Simmons v. Saul, 138 U. S. 439.

² Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627.

³ Simpson v. Bailey, 80 Md. 421; Appeal of Littleton, 93 Pa. St. 177.

⁴ Kander v. Mugele, 153 Pa. 493.

neither it nor the sale can be impeached on a collateral attack.¹

The authority of a guardian or administrator is confined to the State by whose courts he was appointed. Hence, he cannot be authorized to sell property situate in another State.² A sale made by a foreign guardian,³ or by a parent in his capacity of natural guardian,⁴ or by one who falsely represents himself to be a guardian,⁵ or by one who has ceased to be a guardian,⁵ is void. If the statute requires the application for a guardian's sale to be filed in the county in which the ward resides, or in case he resides out of the State, then in the county in which the land sought to be sold lies, the filing in the proper county has been held to be jurisdictional, and, therefore, a prerequisite to a valid order of sale.⁶

§ 11. **There must be a Sufficient Petition for License to Sell—What Petitions are Insufficient.**—As in an action at law, the declaration should aver the facts entitling the plaintiff to judgment, so in a petition in probate, for authority to sell property, the matters necessary to justify the sale must be set forth. In truth, this necessity seems to be more imperative in the case of the petition than in that of the declaration. The judgment of a court of law can rarely, if ever, be treated as void, because pronounced upon an insufficient complaint. An order in probate must be supported by a petition sufficient in substance to show a legal cause for the order. A license to sell, granted without any petition therefor, is void.⁷ But a mere petition is not

¹ Clancy v. Stephens, 92 Ala. 577; Lanford v. Dunklin, 71 Ala. 594.

² McAnulty v. McClay, 16 Neb. 418.

³ McNeil v. Congregational Society, 66 Cal. 105; Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627.

⁴ Grier's Appeal, 101 Pa. St. 412.

⁵ Phelps v. Buck, 40 Ark. 219.

⁶ Spellman v. Dow, 79 Ill. 66.

⁷ Teverbaugh v. Hawkins, 82 Mo. 180; Alabama Conference v. Price 42 Ala. 39; Wyatt's Admr. v. Rambo, 29 Ala. 510; 68 Am. Dec. 89;

enough. The statutes of each State designate the contingencies in which the real estate of a deceased or incompetent person may be ordered to be sold. The probate courts have no power to license a sale in the absence of these contingencies. The statute prescribes the limit of the judicial authority. Action beyond this limit is not irregular or erroneous merely—it is non-judicial. If the causes of sale designated by statute are too few, relief must be sought from the legislature. An order of sale made to accomplish a purpose not sanctioned by statute, or based upon a necessity not recognized by statute, is, in legal effect, *coram non judice*. It cannot justify a sale made in pursuance of its directions.¹

The theory of the law is, that the probate courts have no general authority to dispose of an estate in process of administration; that their power of disposition is special and limited, and that he who relies upon the power must disclose a state of facts sufficient to call it into being. It is also essential that the petition state a sufficient cause of action. The order of the court is based upon the petition, and cannot draw its support from beyond the petition, unless the statute otherwise provide. If the petition states no cause of sale, it cannot be competent to prove, in support of the sale, that the court in fact received evidence of facts not relied upon by the petition, and that its action was, in fact, induced by proof of the causes of sale

Ethell v. Nichols, 1 Idaho (N. S.), 741; Finch v. Edmondson, 9 Tex. 504. But in Withers v. Patterson, 27 Tex. 499, 86 Am. Dec. 643, and in Alexander v. Maverick, 18 Tex. 179, 67 Am. Dec. 695, it was intimated that the absence of a petition might not be fatal, and so decided in Runwell v. St. Alban's Bank, 28 Minn. 202.

¹ Bompert v. Lucas, 21 Mo. 598; Farrar v. Dean, 24 Mo. 16; Newcomb v. Smith, 5 Ohio, 448; Withers v. Patterson, 27 Tex. 499; Strouse v. Drennan, 41 Mo. 298; Beal v. Harmon, 38 Mo. 435; Ikelheimer v. Chapman, 32 Ala. 676; Sanford v. Granger, 12 Barb. 392; Woodruff v. Cook, 2 Edw. Ch. 259; Cornwall's Estate, 1 Tucker, 250; Hall v. Chapman, 35 Ala. 553.

omitted from the petition, but specified in the statute.¹ Some of the statutes designate, in general terms, the purposes for which a sale may be licensed, and declare that the application for such license must be in writing and must show the necessity for the sale. Other statutes enumerate with considerable particularity the matters to be inserted in the petition. Even where the statute does not contain any special enumeration of the matters to be stated, it is evident that a petition may be fatally defective: 1st, when it seeks an improper object, as, for instance, the sale of property for a supposed benefit to the estate, when the statute authorizes a sale for no such purpose; and, 2d, when a proper object is sought, but the sale is not shown to be necessary to obtain it, as where a sale is asked to pay debts, but no debts are shown to exist, or the deficiency of personal assets with which to pay the debts is not affirmed. "A long series of decisions in this State—uniformly holding to the same rule—has determined that the application of an executor or administrator for the sale of lands belonging to the estate is a special and independent proceeding; that the jurisdiction of the probate court depends absolutely on the sufficiency of the petition—in other words, on its substantial compliance with the requirements of the probate act. Though the proceeding for the sale occurs in the general course of administration, it is a distinct proceeding in the nature of an action, in which the petition is the commencement and the order of sale is the judgment. The necessity for a sale is not a matter for the administrator or executor to determine, but is a conclusion which the court must draw from the facts stated, and the petition must furnish materials for the judgment." ² Upon the theory

¹ Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656.

² Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656; Wilson v. Armstrong, 42 Ala. 168, 94 Am. Dec. 635; Spencer v. Jennings, 114 Pa. St. 618; Serron v. Black, 79 Ala. 507; Wilson v. Holt, 83 Ala. 528; Haynes v. Meeks, 20 Cal. 288; Gregory v. McPherson, 13 Cal. 562; Hall v. Chap-

that it is indispensable that the petition show a necessity for the action of the court, it has been held that an application by an executor for an order of sale is fatally defective, even when collaterally assailed, if it does not negative the existence of a power of sale in the will, and thereby establish that he cannot proceed unless first authorized by the order of the court.¹

The policy of the law has always been in favor of preserving the real estate of heirs. Hence, if any necessity arises for the raising of money, resort must first be had to the personal estate of the heir or ward. It is not probable that a petition for the sale of real estate would give jurisdiction to any probate court in the Union, if it failed to show that the personal estate was either exhausted or was insufficient to produce the requisite funds.² By a statute of New York, an administrator, suspecting the personal estate of the deceased to be insufficient to pay the debts, was required to make an account of such personal estate and deliver it to the judge of the court of probate, or the surrogate of the county, and request his aid in the premises. Thereupon, an order issued to the person interested to show cause why the real estate should not be sold. The account, being essential to showing the deficiency of per-

man, 35 Ala. 553; *Jackson v. Robinson*, 4 Wend. 436; *Fitch v. Miller*, 20 Cal. 352. But by section 1518, Code Civil Procedure of California, "a failure to set forth the fact showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale." See also sec. 1537, Cal. C. C. P.

¹ *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 726. In truth, the decisions in this State substantially affirm that whenever the statements in a petition for the sale of real property are so defective that objections made thereto, before the granting of the order, should have been sustained, the court is without jurisdiction, and hence, though no objections are interposed, the order and subsequent proceedings resting thereon must be adjudged void. *Sermon v. Black*, 79 Ala. 507.

² *Gregory v. Tabor*, 19 Cal. 397; *Stuart v. Allen*, 16 Cal. 473, 76 Am. Dec. 551; *Wattles v. Hyde*, 9 Conn. 10.

sonal assets, was treated as jurisdictional. A sale, in its absence, was always held void.¹

The statutes generally require petitions for orders to sell real estate to be verified. The courts, nevertheless, have declared that verification was not a matter jurisdictional in its nature; and, therefore, that its omission was not a fatal irregularity.² In most States the proceedings for the sale of real estate are adversary proceedings. In such proceedings parties defendant, as well as plaintiff, are essential. As the heirs occupy the position of defending parties, the petition should show who they are in order that they may be brought into court.³ The failure to name them has been held fatal.⁴ If the petition makes no attempt to name the heirs, or it otherwise appears therefrom that the names of some of them are omitted, the case falls within the rule. It may be, however, that the petition is perfect on its face in that it purports to name all of the heirs, or to name them according to the best of the petitioner's knowledge and belief. A petition of this character is sufficient upon its face, and an order of sale based thereon cannot be collaterally avoided on the ground that the name of an heir was incorrectly stated or entirely omitted.⁵

¹ Bloom v. Burdick, 1 Hill, 130, 37 Am. Dec. 299; Corwin v. Merritt, 3 Barb. 341; Ford v. Walsworth, 15 Wend. 450; Jackson v. Crawfords, 12 Wend. 533; Atkins v. Kinnan, 20 Wend. 241, 32 Am. Dec. 534; Wood v. McChesney, 40 Barb. 417. See Forbes v. Halsey, 26 N. Y. 53.

² Trumble v. Williams, 18 Neb. 144; Hamill v. Donnelly, 75 Iowa, 93; Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627. *Contra*, apparently, Willis v. Pauly, 116 Cal. 575.

³ Morris v. Hogle, 37 Ill. 150, 87 Am. Dec. 243; Hoard v. Hoard, 14 Ala. 590; Turney v. Young, 22 Ill. 253.

⁴ Guy v. Pierson, 21 Ind. 18; McCorkle v. Rhea, 75 Ala. 213; Hord v. Hord's Admr., 41 Ala. 590; *In re John's Estate*, 18 N. Y. Supp. 172, 21 Civ. Pro. Rep. 326; Jenking v. Young, 35 Hun, 569. *Contra*, that the omission of the names of the heirs is an irregularity merely. Gibson v. Roll, 27 Ill. 92, 83 Am. Dec. 181; Stow v. Kimball, 28 Ill. 106; Morris v. Hogle, 37 Ill. 150, 87 Am. Dec. 243.

⁵ Townsend v. Steele, 85 Ala. 580; McCormack v. Kimmel, 4 Ill. App. 121.

The petitioner cannot, at the hearing, abandon the grounds stated in his petition and obtain a license to sell on some other ground. A court having jurisdiction of a petition for a sale to pay debts, cannot thereon grant a valid license to sell to promote the interest of the heirs.¹

The property sought to be sold must generally be described in the petition. No jurisdiction is obtained over that which is not described. A license to sell the whole of the real estate of a decedent, based on a petition to sell a part, is void.² A description contained in a petition for a sale of real property, may be assailed on the ground that the description contained therein is equally applicable to two or more parcels of land, or is not sufficient to designate any particular parcel, or, though entirely sufficient upon its face, applies only to a parcel in which the decedent had no interest. In the latter case in the subsequent proceedings the property intended may have been correctly described, and evidence may be offered to show that the description inserted in the petition was in fact intended to apply to a parcel of property owned by the decedent and subsequently sold by his executor or administrator. All this must be unavailing. A description of one parcel cannot be converted into a description of another, nor can the sale of the latter be supported by proof of the mistake.³

A description is not inadequate to support the order of sale, if it is such as would be sufficient in a conveyance, or as is rendered intelligible by the aid of facts of which the court has judicial knowledge.⁴ Where a petition for a

¹ Williams v. Childress, 25 Miss. 78.

² Verry v. McClellan, 6 Gray, 535, 66 Am. Dec. 423; Tenny v. Poor, 14 Gray, 502, 77 Am. Dec. 340.

³ Hanson v. Ingwaldson, 77 Minn. 533, 77 Am. St. Rep. 692; Kurtz v. St. Paul & D. R. Co., 65 Minn. 60; Melton v. Fitch, 125 Mo. 281; Hazelton v. Borgardus, 8 Wash. 102.

⁴ Grant v. Hill (Tex. Civ. App.), 44 S. W. Rep. 1027; Smitha v. Flournoy, 47 Ala. 345. "Southeast quarter of sec. 19, T. 12:9," is fatally

license to sell lands of minors stated that it was all the real estate belonging to them in a certain addition to the city of Omaha, but by mistake described it as in block W of that addition, whereas it contained no block W, and the property was in fact situated in block U, the petition was held to be sufficient upon the ground that it contained two inconsistent descriptions of the property, "the one general and the other specific, the former true and the latter in part false and incapable of being applied to any tract of land," and that the false description should be rejected and the general description of the property held sufficient to sustain the subsequent sale. The court said: "The office of a description in a deed is not to identify the lands, but to provide means of identification; and it is sufficient when this is done. It must be conceded, we think,—for such is undoubtedly the law,—that the description of the property in the proceedings by a guardian for the sale of the lands of the ward need not necessarily be more specific, definite, and certain than is demanded in deeds or other conveyances of real property. A conveyance is not void for want of description where an uncertainty as to the identity of the land can be explained by extrinsic proofs. A deed simply describing in the granting clause all the grantor's lands in the State, or within a certain county or city, is not void for indefiniteness, but is a sufficient description *aliunde* of what lands the grantor at the time owned."¹ A petition for the sale of the land of minors described it as a one-twelfth interest of each of the minors "in the southeast quarter of section 12, range 17, township 12." In an action of ejectment it was subsequently objected that this description was not sufficient to sustain the sale, on the ground that it did not state in what county or State the land was situate, nor whether in range east or west, or township north or south.

defective as a description. *Weed v. Edmonds*, 4 Ind. 468. "Section 12' T. 17, R. 21," was held sufficient in *Wright v. Ware*, 50 Ala. 549.

¹ *Hubermann v. Evans*, 46 Neb. 784.

The court sustained the description on the ground that the property was situate in Shawnee county, that all the parties interested in the land resided, and the proceedings were had, in that county, and that no person could have been misled as to where the land was actually situated.¹ There can be no doubt of the correctness of the decision, provided there was no other tract of land in Shawnee county to which the descriptive words were as applicable as to the land intended to be sold and actually sold. The petition need not state, in Missouri, that the property belonged to the decedent.² In Kansas it does not appear to be essential to particularly describe the real property of a decedent in a petition for its sale. It is sufficient in that State, at least, when the question arises collaterally, that the petition aver that it is necessary to sell the real estate and name the county in which it is situate.³ This decision is not, in our judgment, sustained by the cases upon which the court appears to rely, and we apprehend it will find little favor in any court which regards itself as bound by the general rule that a sale of real estate must be supported by a sufficient petition. If there is anything essential in a petition or complaint, we think it must be a designation of its subject-matter, in language sufficiently exact to enable a competent person to understand its location and extent. If real property is described as "part of claim No. 2087, survey No. 440, in township 6 south, range 8 west, and part of claim No. 559, survey No. 696, in township 6 south, of range 7 west, saving and excepting 73 76-100 acres of claim No. 2087, survey No. 440, sold by Catherine Fisher by virtue of an order of the probate court, made at the January Term, 1869,"⁴ or as "an estate in possession in about three-quarters of an acre of land, being the same, more or less, situate south of

¹ *Howbert v. Heyle*, 47 Kan. 58.

² *Trent v. Trent*, 24 Mo. 307.

³ *Bryan v. Bander*, 23 Kan. 95.

⁴ *Borders v. Hodges*, 154 Ill. 498.

North Main street, in the town of Cohasset, in the county of Norfolk,"¹ or as "the undivided one-half of a league of land on Clear Lake," or as "the undivided one-half part of a farm and vineyard at Sonoma, containing eight hundred and thirty-three acres, more or less," or as "eighty acres of land lying north of Courtland, and east of the Lamb's Ferry Road," it is clear that no person, from these descriptions alone can locate the tracts thus imperfectly designated, and that sales based on such descriptions must be void.²

Some of the more recent cases exhibit a disinclination to enforce the general rule exacting a sufficient petition as a prerequisite to a valid order of sale. The petitions sustained in such cases will generally be found either to be deficient in formal matters, while they set forth informally matters amply adequate to sustain a sale, or else to be aided by some statute which undertakes to limit the cases in which sales of the class in question may be adjudged void.³ But it is still requisite in most, if not in all of the States, that the action of the court be based on a sufficient petition; and by a sufficient petition we mean one which at least shows the property intended to be sold, the existence of facts warranting such sale under the statutes of the State, and generally such other facts as the statute directs to be inserted in such petition, to enable the court the better to judge of the necessity or advisability of the sale.⁴ There are other matters with respect to which the provisions of the statute have been regarded as directory merely. Thus, though the statute directs that the petition shall be verified,

¹ Pratt v. Bates, 161 Mass. 315.

² Wilson v. Hastings, 66 Cal. 243; Gilchrist v. Shackelford, 72 Ala. 7.

³ McKeever v. Ball, 71 Ind. 398; Worthington v. Dunkin, 41 Ind. 515; Moffitt v. Moffitt, 69 Ill. 641; Stanley v. Noble, 59 Iowa, 666.

⁴ Boland's Estate, 55 Cal. 310; Wilson v. Hastings, 66 Cal. 243; Rose's Estate, 63 Cal. 346; Wright v. Edwards, 10 Or. 298; Hayes v. McNealy, 16 Fla. 409; Ryder v. Flanders, 39 Mich. 336; Young v. Young, 12 Lea, 335; Arnett v. Bailey, 60 Ala. 435.

the absence of such verification has never been held fatal. The jurisdiction of the court was thought to be called into action by a petition stating the requisite facts, and the absence of verification was adjudged to be a mere irregularity.¹ An administrator or executor, in petitioning for a sale, need not aver the death of the testator or intestate, nor the time or mode of the petitioner's appointment; but may simply, upon this subject, state that he is the executor or administrator, as the case may be, of the decedent.²

§ 12. **Statutes Designating what Petition for Order of Sale must Contain.**—Where a statute enumerates the matter to be contained in the petition for the sale of real estate, its object is to compel petitioners to disclose the supposed necessity of the sale, and also to furnish information which will aid the court in determining upon the best course of action, in case it finds a sale to be necessary. The statute of California exacts more than any other which has come under our observation.³ It requires a verified petition setting forth: 1, the amount of personal property that has come into the hands of the administrator, and how much remains undisposed of; 2, the debts of the decedent; 3, the amount due or to become due on the family allowance; 4, the debts, expenses and charges of administration accrued and to accrue; 5, a general description of all the real property of which the decedent died seized, or in which he had any interest, or in which the estate had acquired any interest, and the condition and value thereof, and whether the same be community or separate property; 6, the names of the heirs, legatees and devisees of the de-

¹ Ellsworth v. Hall, 48 Mich. 407; Coon v. Fry, 6 Mich. 506; Trumble v. Williams, 18 Neb. 144; Johnson v. Jones, 2 Neb. 126; Williamson v. Warren, 55 Miss. 199.

² Moffitt v. Moffitt, 69 Ill. 641; Stow v. Kimball, 28 Ill. 93.

³ C. C. P. of Cal., sec. 1537. See also Starr & Curtis' Stat. Ill., pp. 325, 327, secs. 99, 100; General Stat. of Kan., p. 537, secs. 117 to 120; Howell's Ann. St. Mich., secs. 6027, 6086; Stat. of Minn. (Ed. 1894), sec. 4575; Rev. Stat. Mo. (Ed. 1889), p. 149, secs. 145, 146.

ceased, so far as known to the petitioner. If any of the matters here enumerated cannot be ascertained, it must be so stated in the petition.¹ Whenever the question has arisen, the supreme court of this State has decided that the power of the probate court to order a sale depended upon a petition in substantial compliance with the statute.² In Missouri, if any person dies, and his personal estate is insufficient to pay his debts and legacies, his executor or administrator must present a petition stating the facts.³ The petition must be accompanied by a true account of his administration; a list of debts due to and by the decedent, and remaining unpaid, and an inventory of the real and personal property, with its appraised value, and all other assets.⁴ It seems now to be settled in that State, that the jurisdiction of the court attaches on the filing of the petition, and that the omission of the accounts and lists, required by statute to accompany it, is not fatal.⁵ In Wisconsin and several other States, the statute provides that sales shall not be avoided on account of any irregularity, if it appears: 1, that the executor, administrator or guardian was licensed to make the sale by the probate court having jurisdiction; 2, that he gave a bond on the granting of the license; 3, that he took the oath as prescribed by statute before making the sale; 4, that he gave the notice of the sale; and, 5, that the premises were sold in good faith and

¹ C. C. P. of Cal., sec. 1537.

² *Gregory v. McPherson*, 13 Cal. 562; *Stuart v. Allen*, 16 Cal. 473, 76 Am. Dec. 551; *Townsend v. Gorden*, 19 Cal. 188; *Gregory v. Taber*, 19 Cal. 397, 79 Am. Dec. 219; *Haynes v. Meeks*, 20 Cal. 288; *Fitch v. Miller*, 20 Cal. 352. Also, to same effect, *Ackley v. Dygert*, 33 Barb. 190; *Bree v. Bree*, 51 Ill. 367.

³ 1 Rev. Stat. of Mo. (Ed. 1889), p. 149, sec. 145.

⁴ 1 Rev. Stat. of Mo. (Ed. 1889), p. 150, sec. 146.

⁵ *Overton v. Johnson*, 17 Mo. 442; *Mount v. Valley*, 19 Mo. 621; *Grayson v. Weddle*, 63 Mo. 523; *Pattee v. Thomas*, 58 Mo. 163. These cases, we think, are, in principle, directly opposed to the New York cases—*Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299; *Ford v. Walsworth*, 15 Wend. 450; *Jackson v. Crawfords*, 12 Wend. 533.

the sale confirmed. Under this statute sales based on defective petitions are held valid.¹

§ 13. Petitions for Sale Liberally Construed—When Other Papers may be Referred to.—The rule of law that declares void probate sales based on insufficient petitions, is very harsh in its operation. To avoid the necessity of applying the rule, the courts will construe petitions as liberally as possible. They will not require the use of the exact language of the statute; they will forgive all errors of form; they will regard it as sufficient if the matters stated are substantially those required to be stated, and, in interpreting the language used, they will seek to find in it something to support, rather than to destroy the title based on the probate proceedings.² The question presented when a sale is collaterally attacked is necessarily quite different from that involved in a special demurrer or other objection to a petition for an order of sale,³ for the court to which the petition is presented necessarily has authority to determine its sufficiency, and if there is enough in the petition to invoke the action of the court, any resulting error is an appropriate subject for consideration upon appeal, but not a ground for absolutely disregarding the order or other judgment of the court. Whether a statute expressly so directs or not, it may be assumed that every petition must

¹ Reynolds v. Schmidt, 20 Wis. 374; Mohr v. Tulip, 40 Wis. 66; Mohr v. Manniere, 101 U. S. 41, 9 Ch. L. N. 270; 1 Stat. Minn. (Ed. 1894) sec. 4612; Coon v. Fry, 6 Mich. 506; Woods v. Monroe, 17 Mich. 238; McKeever v. Ball, 71 Ind. 406; Runwell v. St. Alban's Bank, 28 Minn. 202.

² Morrow v. Weed, 4 Iowa, 77, 66 Am. Dec. 122; King v. Kent's Heirs, 29 Ala. 542; Moffitt v. Moffitt, 69 Ill. 641; De Bardelaben v. Stoudenmire, 48 Ala. 643; Fitch v. Miller, 20 Cal. 382; Haynes v. Meeks, 10 Cal. 315; Wright v. Ware, 50 Ala. 549; Maurr v. Parrish, 26 Ohio St. 636; Wing v. Dodge, 80 Ill. 564; Bowen v. Bond, 80 Ill. 351; Burns v. Adams, 98 Cal. 667; Richardson v. Butler, 82 Cal. 172, 16 Am. St. Rep. 101; Scarf v. Aldrich, 97 Cal. 360, 33 Am. St. Rep. 190; Lyne v. Sanford, 82 Tex. 58, 27 Am. St. Rep. 852.

³ Silverman v. Gundelfinger, 82 Cal. 548; Estate of Devincenzi, 119 Cal. 498; Bateman v. Reitler, 19 Colo. 547; Ackerson v. Orchard, 7 Wash. 377.

show some necessity for the action sought, and if the petition is for the sale of real property, it is generally necessary to disclose the necessity for some sale and the reason for resorting to the real property. The cause for seeking a sale is ordinarily the existence of debts, legacies, or charges or expenses of administration and the want of moneys in the hands of the executor or administrator with which to pay them, and as it is usually the policy of the law not to sacrifice real property when the sale of personalty will avoid it, the inadequacy of personal property to meet the necessities of the estate must generally be stated. A petition alleging that the estate of the decedent "is owing debts to the amount of three hundred and fifty dollars, and that the personal property of the said decedent is insufficient for the payments of the debts thereof, and that the will of the decedent gives no power to sell the lands of said estate for the payment of debts," justifies the granting of an order of sale, or, at all events, is sufficient to protect the sale based thereon from collateral attack.¹ Though a statute declares that whenever, after inventory and appraisement, it appears that the personal estate of any decedent is insufficient to discharge the just debts, resort may be had to the real estate, and that the petition must set forth the value of the personal property according to the inventory, a petition is sufficient to support a sale, notwithstanding it does not refer to any inventory or appraisement, if it alleges the amount and value of the estate and the debts and claims, and describes the property sought to be sold and the interest of the decedent therein.²

Where, as in California, the statute requires a petition for the sale of real property to describe all the realty of the decedent and to state its condition, an entire omission to comply with the statute seems to leave the petition inade-

¹ *Meadows v. Meadows*, 73 Ala. 356; *Moore v. Cottingham*, 113 Ala. 148, 59 Am. St. Rep. 100.

² *Nichols v. Lee*, 16 Colo. 147.

quate to invoke the exercise of the jurisdiction of the court or to support a sale founded upon its order.¹ A petition, the only statement in which respecting the condition or value of the land is that it is an "unperfected claim under the homestead laws of Congress" to certain land, specifically describing it, is fatally defective, because it cannot be ascertained therefrom what the property is worth, whether it is improved or unimproved, productive or unproductive, occupied or vacant, nor is there anything therein from which the court can intelligently exercise its judgment in determining whether this land or this interest therein should be sold.² A description of a city lot as "unimproved," is a sufficient statement of its condition to give jurisdiction to the court, and to sustain its subsequent order directing a sale of the property.³ Where the petition for a sale described the property as an undivided one-half interest in that certain piece or parcel of land, with the improvements, giving the boundaries of the lot, and stated that its condition was "fair," and its value four thousand nine hundred dollars, it was said that the information disclosed by this description was, that the property was improved, and its condition fair, and that "although the statement was not very definite, and might have been objected to at the hearing on the ground of uncertainty," yet the petition "contained a statement which purported to set forth the condition of the property, the attention of the court was challenged to its merits, and it was authorized to determine whether the statement was sufficient. The court had jurisdiction to determine whether a statement that the condition of the property was "fair" was sufficient, and even though it erred in its conclusion, its judgment was not void."⁴ When the application is to sell real property of a decedent

¹ Estate of Boland, 55 Cal. 310.

² Kertchem v. George, 78 Cal. 597.

³ Richardson v. Butler, 82 Cal. 172, 16 Am. St. Rep. 101.

⁴ *Re Devincenzi's Estate*, 119 Cal. 498.

for the purpose of paying debts, legacies, or charges of administration, the petition should describe all his real property, and show the condition of each parcel, for the purpose of enabling the court to decide which should be sold and which retained. If, on the other hand, the petition is by a guardian for authority to sell lands of his ward, though the statute declares that the petition shall set forth the condition of the estate of the ward, and the facts and circumstances on which the petition is founded tending to show the necessity or expediency of the sale, "if the sale is asked on the ground that it is *necessary*, there is the same reason for requiring a statement of the ward's real estate as exists in the ordinary case of a sale by an executor or administrator; *i. e.*, to enable the court to decide what particular part it is best to sell. But if the sale is asked upon the ground that it is for the interest of the ward that some portion of his land should be sold and the proceeds invested, it is manifest that the condition of the property to be sold is the only matter to be inquired into, and that the policy or expediency of selling it is in no wise affected by the condition of other portions of his estate. The beginning and end of the inquiry in such case is, whether the price of the land to be sold can be invested to better advantage in something else, and a petition which fairly presents this question ought to be sufficient to give the court jurisdiction to make the sale."¹

In drafting the petition, reference may be had to some other paper on file, and, by such reference, this paper may be made a part of the petition. The petition, for instance, may state that a full description of the real and personal estate can be ascertained from the inventory on file. Where this is done, it will be sufficient that this jurisdictional fact appears from the inventory.² But, to justify a reference

¹ *Smith v. Biscailux*, 83 Cal. 344.

² *Bentz's Estate*, 36 Cal. 687; *Stuart v. Allen*, 16 Cal. 501, 76 Am. Dec. 551; *Sheldon v. Wright*, 7 Barb. 47.

to the inventory or other paper on file, "it must have been referred to in the petition, so as to become a part of it, for the purpose of reference;"¹ and it seems that the reference made to the inventory or other papers on file, must designate the imperfection or defect which it was intended to supply. Thus, where the reference to the inventory purports to be "for greater certainty," without stating for what the reference was made, whether for description, or value, or condition," the court said: "We think this reference was insufficient to incorporate the inventory as a part of the petition as to description, or value, or condition."² In this case the inventory mentioned several pieces of real property, some of which were sufficiently, and others insufficiently, described. The statute required the description of all the lands of the decedent, in any petition for their sale. The object of this requisition was to disclose to the court all the real property of the decedent, to aid in determining the necessity for the sale of the whole or any part of the lands, and if of a part only, then to advise the court as to which part. Hence, it was held that the fact that some of the parcels were sufficiently described does not, even as to those parcels, cure the defect arising from the imperfect description of the other parcels.³ Though the statute requires the petition to describe all the real property of the decedent, it is evident that the omission of one or more parcels from the petition cannot impair the jurisdiction of the court to act upon it and to grant an order pursuant to its allegations. They must be accepted as true upon collateral attack, and the order of sale cannot be there invalidated by showing an omission of some parcel by mistake or otherwise.⁴ A requirement that the petition state

¹ Gregory v. Taber, 19 Cal. 409, 79 Am. Dec. 219.

² Wilson v. Hastings, 66 Cal. 243.

³ *Ibid.*

⁴ *In re Faulkner*, 57 Hun, 586, 10 N. Y. Supp. 325; *Ackerson v. Orchard*, 7 Wash. 377.

the valuation of each distinct parcel of real estate is sufficiently met where the tract consists of five parcels, and the description shows that they lie together, forming one parcel, and that the valuation thereof is about four thousand dollars.¹

§ 14. **Petition Need Not Be True.**—The jurisdiction of the court over the subject-matter attaches on the filing of a petition sufficient in form. The matter stated in the petition may or may not be true. The functions of the court are of such a character that it may inquire into the truth or falsity of the petition. The petition may be regarded as a complaint. The heirs, when jurisdiction over them is obtained, may be treated as entering a general denial. The order of the court, granting or refusing the prayer of the petition, is in the nature of a judgment conclusively establishing that the sale is or is not necessary. If erroneous, it must be corrected by appeal, or some other appropriate proceeding. It cannot be collaterally avoided by showing that the petition was false.²

§ 15. **Cases Holding that No Notice is Necessary.**—We have already spoken of the proceeding in probate to obtain a sale of real estate as an independent, adversary proceeding *in personam*. If it is, in fact, such a proceeding, then the defendants must be brought before the court by something which is equivalent to the service of process, and given an opportunity of resisting, in case they deem resistance proper to be made. This need not, we think, be any new or independent notice, unless the statute so prescribes. It may, on the other hand, expressly authorize the court,

¹ *In re McGee*, 38 N. Y. Supp. 1062, 5 App. Div. 527.

² *Camden v. Plain*, 91 Mo. 117; *Seymour v. Rickatts*, 21 Neb. 240; *Jackson v. Crawford*, 12 Wend. 533; *Fitch v. Miller*, 20 Cal. 382; *Stuart v. Allen*, 16 Cal. 473, 76 Am. Dec. 551; *Haynes v. Meeks*, 20 Cal. 288; *McCauley v. Harvey*, 49 Cal. 497; *Grignon's Lessee v. Astor*, 2 How. (U. S.) 339; *Bowen v. Bond*, 80 Ill. 351; *Grayson v. Weddle*, 63 Mo. 523; *post*, sec. 20.

at specified stages of the administration, as, on the settlement of the administrator's accounts, to direct the sale of property, whether real or personal, when necessity therefor appears.¹ Under such a statute the jurisdiction of the court may rest upon the original grant of administration, and the notice, if any, required to precede it. The more difficult question is, whether, when the statute expressly requires some notice to be given of an application to sell the property of a decedent or of a minor or other incompetent person, such requirement may not be directory merely, more especially if the proceeding is on behalf of a minor or other incompetent acting by his regularly appointed and qualified guardian. Nearly all the statutes require some order to show cause against the petition to issue, and to be served on the parties in interest, either personally or by publication. In a few of the States this requirement is not jurisdictional. The purchaser need not, in those States, ask whether the notice to show cause against the petition was or was not given. The sale is valid if supported by a sufficient petition and an order of sale made thereon. "On a proceeding to sell the real estate of an indebted estate there are no adversary parties, the proceeding is *in rem*, the administrator represents the land; they are analogous to proceedings in the admiralty, where the only question of jurisdiction is the power of the court over the thing—the subject-matter before them—without regard to the persons who may have an interest in it; all the world are parties. In the orphan's court, and all courts who have power to sell the estates of intestates, their action operates on the estate, not on the heirs of the estate; a purchaser claims, not their title, but one paramount. The estate passes to him by operation of law. The sale is a proceeding *in rem*, to which all claiming under the intestate are parties."²

¹ Day v. Graham, 97 Mo. 398; Hutchinson v. Shelley, 133 Mo. 400.

² Grignon's Lessee v. Astor, 2 How. (U. S.) 338; Beauregard v. New Orleans, 18 How. (U. S.) 497; Comstock v. Crawford, 3 Wall. 396;

This position is maintained more frequently with respect to guardian's sales than with respect to those made by executors or administrators, and with more plausibility. For the petition for sale filed by a guardian, it is with much force insisted, is merely the petition of the ward acting through his duly accredited agent. Under this view the ward is, in legal effect, the petitioner, and there is no necessity of advising him of the existence of his own petition and warning him that it will, at a certain time, be granted. If any notice is required by statute, it is claimed that such notice is for the protection of third persons whose interests may somehow be affected, and that its omission in nowise impairs the force of the proceedings as against the ward.¹ We think the weight of authority and of reason supports this view, but its correctness is by no means universally conceded.² In one State, a distinction was made between petitions by guardians for authority to sell lands for the maintenance and education of their wards and petitions to raise money to pay debts. The latter, it was said, might, perhaps, be regarded as proceedings adverse to

Tongue v. Morton, 6 H. & J. 21; *McPherson v. Cundiff*, 11 S. & R. 422, 14 Am. Dec. 642; *Gager v. Henry*, 5 Saw. C. C. 237; *Doe v. McLoskey*, 1 Ala. 708; *Perkins v. Winter*, 7 Ala. 855; *Matheson v. Hearin*, 29 Ala. 210; *Duval's Heirs v. P. and M. Bank*, 10 Ala. 636; *Field's Heirs v. Goldsby*, 28 Ala. 224; *Satcher v. Satcher's Admr.*, 41 Ala. 39, 91 Am. Dec. 498; *Rogers v. Wilson*, 13 Ark. 507; *Sheldon v. Newton*, 3 Ohio St. 494; *George v. Watson*, 19 Tex. 354; *Mohr v. Manierre*, 101 U. S. 417, 9 Ch. L. N. 270; *Ewing v. Higby*, 7 Ohio, pt. 1, p. 198, 28 Am. Dec. 633; *Robb v. Irwin*, 15 Ohio, 689; *Snevely v. Low*, 18 Ohio, 368; *Benson v. Cilley*, 8 Ohio St. 614—overruling *Adams v. Jeffries*, 12 Ohio, 272; *Lyons v. Hamner*, 84 Ala. 197, 5 Am. St. Rep. 363; *Friedman v. Shamblin*, 117 Ala. 454; *Blanchard v. Webster*, 62 N. H. 467.

¹ *Mohr v. Porter*, 51 Wis. 487; *Mohr v. Manierre*, 101 U. S. 417, 9 Ch. L. N. 270; *Mulford v. Beveridge*, 78 Ill. 458; *Spring v. Kane*, 86 Ill. 580; *Montgomery v. Johnson*, 34 Ark. 74; *Daughtry v. Themeatt*, 105 Ala. 615, 53 Am. St. Rep. 146; *Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190; *Shaw v. Ritchie*, 136 U. S. 548.

² *Washburn v. Carmichael*, 32 Iowa, 475; *Lyon v. Vanatta*, 35 Iowa, 521; *Rankin v. Miller*, 43 Iowa, 11; *Rule v. Branch*, 58 Miss. 552.

minors, and, therefore, not sustainable, unless the statutory notice was given, but that the former were, in effect, proceedings, not only advantageous to the wards, but must be deemed to be made on their application. "The authorities," said the court, "are as conflicting as they are numerous, but we think that the weight of authority is that such a proceeding is one *in rem*—a proceeding in behalf of the ward and not adversary to him—and that notice to such ward is not essential to the jurisdiction of the court to grant the license for the sale."¹

§ 16. **Notice of Petition—Cases Holding it Indispensable.**—A very decided majority of the authorities is opposed to the principles stated in the preceding section, or, at least, to their application to executors' and administrators' sales. This majority declares that the proceeding, to obtain an order to sell real estate, is a new and independent proceeding *in personam*, in which the petitioner is the plaintiff, the petition is the complaint, the parties whose property is to be sold are the defendants, and the order to show cause, or the notice to appear is the summons; that the defendants are not in court until this summons is served, or its service has been waived by persons competent to waive it; and that whenever it is conceded or shown that any person interested was not summoned to appear, substantially as provided by statute, the whole proceeding, as against him, is utterly void.² The administrator, as such,

¹ *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627.

² *In re Mahoney*, 34 Hun, 501; *Jenkins v. Young*, 35 Hun, 569; *Hallock v. Moss*, 17 Cal. 339; *Coy v. Downie*, 14 Fla. 544; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457; *Doe v. Bowen*, 8 Ind. 197, 65 Am. Dec. 758; *Gerrard v. Thompson*, 12 Ind. 636; *Babbitt v. Doe*, 4 Ind. 355; *Good v. Norley*, 28 Iowa, 188; *Washburn v. Carmichael*, 32 Iowa, 475; *Valle v. Fleming*, 19 Mo. 454, 61 Am. Dec. 566; *Campbell v. Brown*, 6 How. (Miss.) 106; *Winston v. McLendon*, 43 Miss. 554; *Puckett v. McDonald*, 6 How. (Miss.) 269; *Vick v. Mayor*, 1 How. (Miss.) 379, 31 Am. Dec. 169; *Hamilton v. Lockhart*, 41 Miss. 460; *French v. Hoyt*, 6 N. H. 370, 25 Am. Dec. 464; *Corwin v. Merritt*, 3 Barb. 341; *Schneider v. McFar-*

has no control over the real estate left by the intestate. His authority to sell, if it exists, was conferred by the orders of the surrogate and the other proceedings before him. The latter derives his power from the statutes, and in order to confer the authority upon the administrator to transfer the title to the land, and thus disinherit the heirs of the intestate, it is requisite that the directions of the statute, so far as they relate to the acquiring of jurisdiction of the subject-matter, and of the parties to be affected by the proceedings, should be strictly complied with. These principles are elementary, and no citation of authority to sustain them is necessary.¹

§ 17. **The Service of Notice on a Minor Cannot be Waived nor Dispensed With.**—It cannot be waived by the minor, because he is incompetent to act for himself.² Neither can it be waived by a guardian, unless the statute in direct terms invests him with that power.³ Nor can the court by any means exonerate itself from complying with the statute. It cannot, without service of the notice on

land, 2 N. Y. 459; *Dakin v. Hudson*, 6 Cow. 222; *Fiske v. Kellogg*, 3 Or. 503; *Taylor v. Walker*, 1 Heisk. 734; *Gibbs v. Shaw*, 17 Wis. 197; *Blodgett v. Hitt*, 29 Wis. 169; *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Rankin v. Miller*, 43 Iowa, 11; *Mickel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161; *Rule v. Broach*, 58 Miss. 552; *Wisner v. Brown*, 59 Mich. 553; *Pinckney v. Smith*, 26 Hun, 524; *Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299; *Dorrance v. Raynsford*, 67 Conn. 1, 52 Am. St. Rep. 266; *Chicago, etc., Co. v. Cook*, 43 Kan. 83; *Cunningham v. Anderson*, 107 Mo. 371, 28 Am. St. Rep. 417; *Hutchinson v. Shelly*, 133 Mo. 400; *Perry v. Adams*, 98 N. C. 167, 2 Am. St. Rep. 326; *Harrison v. Harrison*, 106 N. C. 282.

¹ *Sibley v. Waffle*, 16 N. Y. 185.

² *Winston v. McLendon*, 43 Miss. 254; *Daingerfield v. Smith*, 83 Va. 81.

³ *Doe v. Anderson*, 5 Ind. 33; *Dickison v. Dickison*, 124 Ill. 483; *Hickenbotham v. Blackledge*, 54 Ill. 316; *Hough v. Doyle*, 8 Blackf. 300; *Ingersoll v. Ingersoll*, 54 Tex. 155; *Helms v. Chadbourne*, 45 Wis. 60; *Greenman v. Harvey*, 53 Ill. 386; *Ingersoll v. Mangam*, 84 N. Y. 622; *Roberts v. Roberts*, 61 Ohio St. 96. Nor has an attorney any power to enter an appearance for a minor not served with process. *Bonnell v. Holt*, 89 Ill. 71.

the minor, appoint any guardian *ad litem* for him. The appointment of such guardian and his subsequent appearance in the cause as the representative of the minor cannot cure any jurisdictional defect, nor tend to the validation of a proceeding otherwise void.¹ Service of notice on the guardian of a minor does not, in the absence of a statute to that effect, dispense with the necessity for serving the minor himself.² In New York, a guardian must be appointed for minor heirs on filing the petition, and notice must thereafter be given to heirs. The giving of the notice in advance of the appointment of the guardian is invalid.³ If the person applying for the license to sell is also the guardian of the minors, his position as petitioner is incompatible with his duty as guardian. He cannot, therefore, represent the heir, and the latter must have another representative appointed for the occasion.⁴ In Indiana, the statute authorizes the guardian of a minor, on the presentation of a petition for the sale of lands in which he is interested, to appear for him and consent to the sale. This was held to confer authority upon a person, filling the offices of administrator and guardian, to petition for a sale in his former capacity, and to assent to it in the latter.⁵ In Florida, no service of process on an infant heir is required. The court must appoint a guardian *ad litem*. But if no guardian *ad litem* is appointed, and the general guardian is served with process and appears and represents the minor, the proceedings are not void.⁶ In Mississippi, if the guardian

¹ Chambers v. Jones, 72 Ill. 275; Moore v. Starks, 1 Ohio St. 369; Good v. Norley, 28 Iowa, 188; Clark v. Thompson, 47 Ill. 25, 95 Am. Dec. 457.

² Clark v. Thompson, 47 Ill. 25.

³ Ackley v. Dygert, 33 Barb. 176; Havens v. Sherman, 42 Barb. 636; Schneider v. McFarland, 2 N. Y. 459; Deans v. Wilcoxon, 25 Fla. 980.

⁴ Havens v. Sherman, 42 Barb. 636; Schneider v. McFarland, 2 N. Y. 459; Townsend v. Tallant, 33 Cal. 52, 91 Am. Dec. 617; Kennedy v. Gaines, 51 Miss. 625.

⁵ Jones v. Levy, 72 Ind. 586.

⁶ Price v. Winter, 15 Fla. 66.

of a minor petitions for the sale of the lands of his ward, no notice need be given the latter. A summons must issue to the co-heirs, and also to three of the nearest relatives of the minor living in the State. The omission to summon these relatives is fatal to the subsequent proceedings.¹

§ 18. **The Notice Must be Given in the Manner Prescribed by Statute, or it is Inoperative.**²—Sometimes the manner of giving notice is not specified by the statute, but is left for the direction of the court, or, though the statute specifies the form of the notice, the authority to give it must be found in some order of court. In either case, it seems evident that the direction of the court is indispensable, and the one given must be substantially followed.³ A notice or citation may be assailed on the ground (1) that it was not given for the time required, or (2) that it was not published or otherwise served in the manner provided by law or the order of the court, or (3) that with respect to its contents it does not substantially correspond with such law or order. If the notice attempts a description of the land sought to be sold, the description must be correct. A license to sell one tract of land, founded on a notice designating a different tract, is void.⁴ If a statute directs notice to be given by personal service, unless publication thereof is ordered by the court, a publication is, in the absence of such order, inoperative.⁵ If a copy of the petition and account are required to be served, the service of a summons in their stead is unauthorized, and, therefore, void.⁶ If a publication is directed to be made in a specified newspaper

¹ *Stampley v. King*, 51 Miss. 728.

² *Herdman v. Short*, 18 Ill. 59; *Gibson v. Roll*, 27 Ill. 190, 83 Am. Dec. 181; *Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243; *Schnell v. Chicago*, 38 Ill. 383, 87 Am. Dec. 304; *Bree v. Bree*, 51 Ill. 367.

³ *Cunningham v. Anderson*, 107 Mo. 371, 28 Am. St. Rep. 417.

⁴ *Frazier v. Steenrod*, 7 Iowa, 339, 71 Am. Dec. 447. *Contra*: *Maurr v. Parrish*, 26 Ohio St. 636.

⁵ *Halleck v. Moss*, 17 Cal. 339.

⁶ *Johnson v. Johnson*, 30 Ill. 223.

for four weeks, it cannot be made in that paper for three weeks, and in another paper the remaining week.¹ If the return day named in the order to show cause, though fixed by the court, is not a day on which it can by law be made returnable,² or is not sufficiently distant to permit the giving of the notice for the full time prescribed by law, the subsequent proceedings based on such order to show cause are void.³ The return day may, by the court, be fixed at a more distant period than that sanctioned by the statute, and it has been insisted that where such is the case, as the proceeding is purely statutory, and jurisdiction depends on compliance with the statutory requirements, the court has no authority to proceed. In a case involving this question, the date fixed was only one day later than that permitted by the statute, and the court was of the opinion that this was not a substantial departure from the requirements of the statute. The court said: "What the legislature had in view was the purpose of granting full opportunity to all persons in interest to be heard in the proceeding. It is obvious that the addition of a day to the statutory time cannot be deemed to be any impairment of that opportunity; or to work any possible prejudice of rights. If it was an irregularity at all, it was not one which abridges the rights of any one, and therefore could not affect the foundation of the proceedings."⁴ Ordinarily, there is a wide distinction between the effect of process defectively served and process not served at all; and this distinction, to some extent at least, applies to proceedings in probate. Hence, it has been held that, under a statute requiring the notice of application for an order of sale to be personally served on a minor, a return showing service by reading the notice to the minor and leaving a copy with his father, is sufficient to maintain

¹ *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617.

² *Haws v. Clark*, 37 Iowa, 355.

³ *Stilwell v. Swarthout*, 81 N. Y. 109.

⁴ *O'Connor v. Huggins*, 113 N. Y. 511.

the jurisdiction of the court over such minor, because the case "is not one of no notice, but of defective service of notice."¹

§ 19. **The Notice Must be Given for the Time Prescribed.**—The publication of a notice for a shorter time than that sanctioned by law is void, and can impart no validity to a sale or other subsequent proceeding resting upon it.² This is true, although the time is shortened by an order of court in a case where the statute does not give the court that power.³ If a statute requires the notice to be published for three successive weeks, the first publication to be six weeks before the presentation of the petition, and the notice, as published, designates a day for the presentation less than six weeks from the date of the first publication, the notice is void, and cannot be made valid by presenting the petition at a later day than that specified in the notice.⁴ No notice need be given to persons in adverse possession, unless the statute directs it.⁵ Giving notice to a person acting in one capacity seems not to effect him when claiming in another capacity. Hence, a consent given by a woman as guardian of minors was held not to prejudice her claim as widow of the decedent.⁶

§ 19a. **With Respect to Irregularities Occurring after Giving Notice of the Application** and before entering the order of sale, we apprehend that the true rule upon the subject is that stated by the Supreme Court of Alabama as follows: "It has long been the settled doctrine of this court that such irregularities and defects in the proceedings

¹ Bunce v. Bunce, 59 Iowa, 532.

² Townsend v. Tallant, 33 Cal. 45, 91 Am. Dec. 617; Corwin v. Merritt, 3 Barb. 341; Monahan v. Vandyke, 27 Ill. 155; Havens v. Sherman, 42 Barb. 636; Young v. Downey, 145 Mo. 250, 68 Am. St. Rep. 568. *Contra*, by statute, Woods v. Monroe, 17 Mich. 245.

³ Havens v. Sherman, 42 Barb. 636.

⁴ Gibson v. Roll, 30 Ill. 178, 83 Am. Dec. 181.

⁵ Yoemans v. Brown, 8 Met. 51.

⁶ Helms v. Love, 41 Ind. 210.

to sell lands of a decedent for the payment of debts are unavailing in a collateral proceeding to support the validity of the sale or the title of one claiming under it. This doctrine is a rule of property which judicial power cannot change. When the record affirmatively shows that the court had jurisdiction to order the sale by a petition setting forth the necessary jurisdictional facts, that the land was sold by an administrator under its order, the sale confirmed, the purchase money paid, and a deed executed to the purchaser in obedience to the court's mandate, the action of the court is conclusive until vacated in a direct proceeding, and neither the sale nor the title of the purchaser thereunder can be collaterally impeached on account of any irregularities in the proceedings.¹ By statute, in several of the States, the court is authorized to appoint attorneys or guardians *ad litem* to represent minors or absentees who may be interested in the estate.¹ It is believed that the action or non-action of the court is not jurisdictional, and hence that the validity of an order of sale cannot be collaterally attacked on the ground either of failure to appoint such attorney or guardian, or the appointment of a person not qualified to act.² The cases holding to the contrary are chiefly those in which no notice or citation was required by the statute to be given.³ In Massachusetts, a statute declaring that the court shall in every case appoint a suitable person 'to appear and act therein as the next friend of all minors, who are or may become interested,' was regarded as mandatory, and not as directory." "The object of the provision," said the court, "is to protect the interests of the persons described,

¹ Friedman v. Shamblin, 117 Ala. 454; Orman v. Bowles, 18 Colo. 463.

² Friedman v. Shamblin, 117 Ala. 454; Orman v. Bowles, 18 Colo. 463; Barnett v. Wolf, 70 Ill. 76; Clark v. Hillis, 134 Ind. 421; Myers v. Davis, 47 Iowa, 325; Oliver v. Park, 101 Ky. 1; Keller v. Wilson, 90 Ky. 350; Coon v. Fry, 6 Mich. 506; Overton v. Johnson, 17 Mo. 442; McClay v. Foxworthy, 18 Neb. 295; Boody v. Emerson, 17 N. H. 577; Jenkins v. Young, 43 Hun, 194.

³ Price v. Winter, 15 Fla. 66; Schneider v. McFarland, 2 N. Y. 459.

and in order to accomplish that purpose the appointment and qualification of the person appointed, and his examination and the subject-matter of the petition, should precede and not follow the entry of the decree prayed for. In the nature of things, the persons represented are not and cannot be before the court; and justice requires that before a decree can be passed that shall conclude their rights their representatives should be in a position to be heard respecting it.”¹

§ 20. **The Order of Sale and its Effect as an Adjudication.**—If, upon hearing of the petition, the court is satisfied that a proper case exists, it will enter an order or license for the sale of the land. Without such license or order an administrator or guardian is not authorized to proceed, and any sale he may make must be treated as having no support in law.² If the court had jurisdiction this order, until vacated or reversed, is binding upon all parties in interest. The purchaser under it is in no danger of losing his title by proof being made that the order was erroneously given. It cannot be collaterally attacked for error, fraud or irregularity, if the court had jurisdiction.³ When jurisdiction is once obtained over a proceeding, the decision of the court is always conclusive on the parties if

¹ Pratt v. Bates, 161 Mass. 315.

² Hutchinson v. Shelley, 133 Mo. 400; Broadwater v. Richards, 4 Mont. 80; Hunter v. Hunter, 58 S. C. 382; Collins v. Ball, 82 Tex. 259, 27 Am. St. Rep. 877.

³ Freeman on Judgments, sec. 319a; Stow v. Kimball, 28 Ill. 93; Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Farrington v. King, 1 Bradf. 182; Spragins v. Taylor, 48 Ala. 520; Jackson v. Robinson, 4 Wend. 437; Boyd v. Blankman, 29 Cal. 19, 87 Am. Dec. 146; Meyer v. McDougal, 47 Ill. 278; Carter v. Waugh, 42 Ala. 452; Morrow v. Weed, 4 Iowa, 77, 66 Am. Dec. 122; Atkins v. Kinman, 20 Wend. 241, 32 Am. Dec. 534; Mulford v. Stalzenback, 46 Ill. 303; Savage v. Benham, 17 Ala. 119; Sprigg's Estate, 20 Cal. 121; Giddings v. Steele, 28 Tex. 750, 91 Am. Dec. 336; Gurney's Succession, 14 La. Ann. 632; Hatcher v. Clifton, 33 Ala. 301; Walker v. Morris, 14 Ga. 323; Barbee v. Perkins, 23 La. Ann. 331; Gordon v. Gordon, 55 N. H. 399.

it keeps within the limits of its jurisdiction, unless reversed upon appeal, or by some other proceeding sanctioned by law for the purpose of correcting errors of proceeding or decision. This rule applies to courts of inferior, limited or special jurisdiction, as well as to those of the highest rank and most comprehensive authority. When a court grants an order of sale, and in pursuance of such order the property thereby authorized to be sold is sold, the purchaser, to maintain his title, is not required to re-establish the facts which the court must have found to be true before it entered such order, nor yet to defend the legal conclusions which the court drew from such facts. If any errors were committed, as in the admission or rejection of evidence, or in making findings of fact, express or implied, not sustained by the evidence, or in reaching conclusions not warranted by the facts found, the remedy of any party prejudiced thereby is by motion for new trial, or by some other revisory or appellate proceeding. Failing to resort to this remedy, the order of sale must be respected, and cannot be destroyed by any collateral assault.¹ Hence, the sale cannot be nullified by proof that there was no necessity therefor, nor by any other proof which involves a re-examination of the issues necessarily involved in the order of sale.²

An attempted attack upon an order of sale or the sale supported by it may be either on the ground that the court for some reason did not have authority to hear the petition and make the order thereon, or that, on hearing it, it was

¹ *Myers v. Davis*, 47 Iowa, 325; *Fleming v. Bale*, 23 Kan. 88; *McDade v. Burch*, 7 Ga. 559, 50 Am. Dec. 407; *Long v. Weller*, 29 Gratt. 347; *Grayon v. Weddle*, 63 Mo. 523; *Pratt v. Houghtating*, 45 Mich. 457; *Weyer v. Second Nat. Bank*, 57 Ind. 198; *Gardner v. Mawney*, 95 Ill. 552; *Merrill v. Harris*, 26 N. H. 143, 57 Am. Dec. 359; *Lebroke v. Damon*, 89 Me. 113; *Schroeder v. Wilcox*, 39 Neb. 136; *Ward v. Lown-des*, 96 N. C. 337; *Turner v. Shuffler*, 108 N. C. 642.

² *Bowen v. Bond*, 80 Ill. 351; *Allen v. Shepard*, 87 Ill. 314; *Meyers v. Davis*, 47 Iowa, 325; *Arrowsmith v. Harmoning*, 42 Ohio St. 254; *Davis v. Gaines*, 104 U. S. 386; *Abbott v. Curran*, 98 N. Y. 665; *Cromwell v. Hull*, 97 N. Y. 209.

guilty of some irregularity or other error, or that the sale was directed when no sufficient cause existed therefor. The authority of the court to hear and determine the petition is, as we have shown, dependent solely upon some valid law granting it jurisdiction over the subject-matter and upon a sufficient petition and service of the notice or citation. Where the order contains direct recitals concerning what was done in respect to the service of notice or citation, the contradiction of these recitals will not be permitted on a collateral assault.¹ If the order is conclusive of questions of this character, there can be no doubt of its effect as against objections of a less serious nature. As to mere irregularities it may be regarded as a sufficient adjudication, either that the irregularities did not exist, or that the court, notwithstanding their existence, deemed them immaterial, and hence rightly proceeded to ignore them.² Therefore, as against an order of sale, the objection cannot be entertained that the proof of the insufficiency of the personal estate was not made by two disinterested witnesses,³ nor that the person appointed and acting as administrator did not have the necessary qualifications,⁴ nor that the decedent was not at the time of his death an inhabitant or resident of the county in which the administration was had,⁵ nor that letters of administration were issued too late,⁶ nor that there was no exhibit under oath showing the condition of the estate and what debts had been allowed,⁷ nor that

¹ *Goodwin v. Sims*, 86 Ala. 105, 11 Am. St. Rep. 21; *Zillmer v. Gerichten*, 111 Cal. 73; *Bradley v. Drone*, 187 Ill. 175, 79 Am. St. Rep. 214; *Edwards v. Moore*, 99 N. C. 1; *Perry v. Blakey*, 5 Tex. Civ. App. 331; *Lyne v. Sandford*, 82 Tex. 58, 27 Am. St. Rep. 852; *Berriam v. Rogers*, 43 Fed. Rep. 467; *Phillips v. Phillips*, 13 S. D. 231.

² *Moore v. Cottingham*, 113 Ala. 148, 59 Am. St. Rep. 100.

³ *Goodwin v. Sims*, 86 Ala. 167; *Kent v. Mansel*, 101 Ala. 334.

⁴ *Ford v. Mills*, 46 La. Ann. 331.

⁵ *Templeton v. Ferguson*, 89 Tex. 47.

⁶ *King v. Nunn*, 99 Mich. 590.

⁷ *Lyne v. Sandford*, 82 Tex. 58, 27 Am. St. Rep. 852.

the jurat of the affidavit to the warning order was not signed,¹ or that the judge was disqualified to act, such disqualification not appearing by the record.²

With respect to the existence of a cause for the sale, the order must be accepted as a direct adjudication having the force of *res judicata* and estopping the parties before the court and their successors in interest from controverting its express or implied findings for the purpose of overthrowing any sale founded thereon. The necessity for the sale is ordinarily dependent upon some legacy made by, or debt due from, the decedent, or some expense or charge of administration, and in the case of real property, on the insufficiency of the personal estate. The effect of the order cannot be avoided by proving that the personal estate was insufficient to meet all demands,³ or that the debts or other charges for the payment of which the sale was authorized did not exist or were not valid claims against the estate.⁴ Neither can the order of sale be avoided on the ground that fraud is inferable from the course and result of the proceedings,⁵ nor that the court erred in directing an unnecessarily large quantity of land to be sold.⁶ At least, where the question was presented to the court and actually decided by it, its order cannot be assailed collaterally on the

¹ *Sears v. Sears*, 95 Ky. 173, 44 Am. St. Rep. 213.

² *Killough v. Warren* (Tenn. Ch. App.), 58 S. W. Rep. 898.

³ *Sloan v. Sloan*, 25 Fla. 53; *Thomson v. Blanchard*, 2 Lea, 528.

⁴ *Foxworth v. White*, 72 Ala. 224; *Cobb v. Garner*, 105 Ala. 467, 53 Am. St. Rep. 136; *McCauley v. Harvey*, 49 Cal. 497; *Bateman v. Reiter*, 19 Colo. 547; *Deans v. Wilcoxson*, 25 Fla. 180; *Sloan v. Sloan*, 25 Fla. 54; *Judd v. Ross*, 146 Ill. 40; *Munday v. Kaufman*, 48 La. Ann. 591; *Linman v. Riggins*, 40 La. Ann. 761, 8 Am. St. Rep. 549; *Webb v. Keller*, 39 La. Ann. 55; *Egan v. Grece*, 79 Mich. 629; *King v. Nunn*, 99 Mich. 590; *Curran v. Kuhy*, 37 Minn. 330; *Rogers v. Johnson*, 125 Mo. 202; *Macey v. Stark*, 116 Mo. 481; *Gordon v. Gordon*, 55 N. H. 399; *Blanchard v. Webster*, 62 N. H. 467; *Lyne v. Sandford*, 82 Tex. 58, 27 Am. St. Rep. 852; *Manson v. Dincanson*, 166 U. S. 533.

⁵ *Shirley v. Warfield*, 12 Tex. Civ. App. 449.

⁶ *Hodge v. Fabian*, 31 S. C. 212, 17 Am. St. Rep. 25.

ground that the property had been, or should have been, withdrawn from administration. The remedy of the persons opposing the sale in such case is by appeal.¹ There are some cases which appear to permit a re-examination of the legal conclusions drawn by the court in ordering the sale. Thus, sales were held void in one instance, because ordered to raise funds to pay debts barred by the statute of limitation,² and in another because the order did not show any necessity for the sale.³ If these and kindred cases can be maintained upon principle, it must be on the ground that the petitions and orders were so deficient in essential elements that they did not disclose any case calling for judicial action, and, therefore, left the court without jurisdiction, according to the decisions cited in section eleven.

The form of the order is different in the different States. In California, it "must describe the lands to be sold and the terms of the sale."⁴ In Massachusetts, it need not designate which part of the testator's lands are to be sold.⁵ In Texas, an order to sell all the lands of a decedent was thought to be proper,⁶ while a license for the sale of so much as would raise \$1,500 (it appearing that the decedent held 34,000 acres) was regarded as of very questionable validity.⁷ In North Carolina, an order describing a lot and directing it to be sold, if in the settlement of the estate it should be found necessary, was sustained on a collateral attack when questioned on the ground that it was a conditional judgment, or an attempt to confer judicial power on

¹ *Ions v. Harbison*, 112 Cal. 260; *Thomas v. Thompson*, 149 Ind. 391.

² *Heath v. Wells*, 5 Pick. 139, 16 Am. Dec. 383; *Smith v. Wildman*, 178 Pa. St. 245, 56 Am. St. Rep. 760. *Contra*: *Cobb v. Garver*, 105 Ala. 437, 53 Am. St. Rep. 136.

³ *Wyatts v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89.

⁴ C. C. P. of Cal., sec. 1554.

⁵ *Yeomans v. Brown*, 8 Met. 51; *Norton v. Norton*, 5 Cush. 524.

⁶ *Wells v. Polk*, 36 Tex. 120.

⁷ *Graham v. Hawkins*, 38 Tex. 628.

an administrator.¹ In Alabama, a license to sell must designate the place of sale.² The failure to state in the order the time and place of sale, even when the statute directs such statement to be made, is probably a mere irregularity.³ In some of the States the order should set forth that notice was given to the persons interested.⁴ In another, it must, if for the sale of real property, state, to be valid, that the personal estate has been exhausted.⁵ In New Jersey, it should declare the sum which the court has adjudged to be necessary to be raised by the sale.⁶ In Texas, the direction of the statute that the order of sale contain a description of the property to be sold was held to be directory merely.⁷ In Georgia, the order may be to sell "all the real estate of the decedent," without any further attempt at description.⁸ In Arkansas, the fact that the order contains no description does not render it inoperative, if it appears to be granted on a certain petition, and that petition contains a full and adequate description.⁹ We have, however, considered the sufficiency of descriptions of real property in connection with petitions for licenses for its sale, and the rules there stated are equally applicable to orders of sale. Where the description in an order of sale is perfect, it cannot by extrinsic evidence be made to apply to, and support, a sale of an entirely different parcel of land.¹⁰ Where a description is not such as to identify any parcel it cannot support any sale;¹¹ but the description in the order may be aided

¹ *Sledge v. Elliott*, 116 N. C. 712.

² *Brown v. Brown*, 41 Ala. 215; *Bozeman v. Bozeman*, 82 Ala. 389.

³ *Spring v. Kane*, 86 Ill. 580; *Benefield v. Albert*, 132 Ill. 665.

⁴ *Summersett v. Summersett*, 40 Ala. 596, 91 Am. Dec. 494; *Puckett v. McDonald*, 6 How. (Miss.) 269.

⁵ *Sloan v. Sloan*, 25 Fla. 53.

⁶ *Furman v. Furman*, 45 N. J. Eq. 744.

⁷ *Robertson v. Johnson*, 57 Tex. 62.

⁸ *Doe v. Henderson*, 4 Ga. 148, 48 Am. Dec. 216.

⁹ *Montgomery v. Johnson*, 31 Ark. 74.

¹⁰ *Melton v. Fitch*, 125 Mo. 281.

¹¹ *Tilton v. Pearson*, 67 Ill. App. 373.

by the petition on which it is founded, and the order may doubtless adopt that description by proper reference to it, and thus avoid the necessity for its repetition.¹ In California, it was formerly held that "the order of sale must be in itself sufficient, and to make it so the description of land to be sold must be sufficiently definite and certain, without reference to any extraneous matter."² Hence, it was said that the description "twenty-one acres of the Ranch La Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county, in a suit in partition wherein the guardian herein and mother of said minors was plaintiff and said minors were defendants," is fatally defective. This very absurd ruling has been formally abandoned in the court wherein it was made,³ and is not likely to be received with favor elsewhere. That must be regarded as certain which is capable of being made so; and this rule is, upon principle, as applicable to a judgment, decree or order, as to a voluntary conveyance. Giving the number of the lot and block without naming the village or city is insufficient,⁴ but land may be described by abbreviations in common use, as "Sec. 12, T. 17, R. 21," if the county is named;⁵ and the mentioning of "ninety-one acres of the southwest corner" of a designated tract, where the decedent owned only that number of acres in such tract, was held to be sufficient.⁶

¹ Crawford v. McDonald, 88 Tex. 626.

² Hill v. Wall, 66 Cal. 130; Crosby v. Dowd, 61 Cal. 557.

³ De Sepulveda v. Baugh, 74 Cal. 468, 5 Am. St. Rep. 455.

⁴ Herrick v. Ammerman, 32 Minn. 544.

⁵ Wright v. Ware, 50 Ala. 549; Money v. Turnipseed, 50 Ala. 499.

⁶ Bloom v. Burdick, 1 Hill, 130, 37 Am. Dec. 299.

CHAPTER III.

SALES VOID BECAUSE OF ERRORS OR OMISSIONS OCCURRING
AFTER THE JUDGMENT OR ORDER OF SALE.

SECTION.

21. General Rule Regarding the Effect of Irregularities.
22. Failure to Give Additional Bond, or to Take Oath Concerning the Sale.
23. The Necessity of a Valid Execution, or Order of Sale.
24. The Times when an Execution May Not Issue.
- 24a. Loss or Suspension of the Right to Enforce an Execution Rightfully Issued.
25. Writs of Execution Must be Sufficient in Form.
26. Sales in the Absence of Levies.
27. Sales without Inquisition or Appraisement.
28. Sales without Notice.
29. Sales, by Whom may be Made.
30. Sales Made at an Improper Time.
31. Sales Made at an Improper Place.
32. Sales not at Public Auction.
33. Sales to Persons Disqualified from Purchasing.
34. Sales to Raise More Money than was Authorized.
35. Sales of Property not Liable to Sale.
36. Sale of a Different or Less Interest.
37. Sale of Unlocated Part.
38. Sales of Property in Adverse Possession.
39. Sales *en masse*.
40. Sales Infected by Fraudulent Combinations and Devices.
41. Purchaser's Title not Affected by Secret Frauds.
- 41a. Purchaser's Title, Secret Equities and Transfers.

§ 21. **General Rule Regarding Irregularities.**—When a judgment or order of sale has been pronounced it must

next be enforced. The authority which pronounces it is judicial. That which enforces it is chiefly ministerial. In the exercise of this ministerial authority, various errors of commission or omission are likely to occur. We shall devote this chapter to a brief and, necessarily, imperfect enumeration of those ministerial errors, on account of which a judicial, execution or probate sale may be adjudged void. With respect to judicial and execution sales, "the general principle to be deduced from the authorities is, that the title of a purchaser, not himself in fault, cannot be impaired at law nor in equity by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected by a direct proceeding. If not so corrected they cannot be made available by way of collateral attack on the purchaser's title."¹

Probate sales, we are sorry to say, are generally viewed with extreme suspicion. Though absolutely essential to the administration of justice, and forming a portion of almost every chain of title, they are too often subjected to tests far more trying than those applied to other judicial sales. Mere irregularities of proceeding have, even after the proceedings had been formally approved by the court, often resulted in the overthrow of the purchaser's title. In fact, in some courts, the spirit manifested toward probate sales has been scarcely less hostile than that which has made tax sales the most precarious of all the methods of acquiring

¹ Freeman on Executions, sec. 339; Freeman on Co-tenancy and Partition, sec. 548; Winchester v. Winchester, 1 Head, 460; Whitman v. Taylor, 60 Mo. 127; Hedges v. Mace, 72 Ill. 472; Cooley v. Wilson, 42 Iowa, 428; DeForest v. Farley, 62 N. Y. 628; Byers v. Fowler, 12 Ark. 218, 54 Am. Dec. 271; Sydnor v. Roberts, 13 Tex. 598, 65 Am. Dec. 84; Millis v. Lombard, 32 Minn. 259, 19 N. W. Rep. 187; Wallace v. Loomis, 97 U. S. 146; Fitzpatrick v. Peabody, 51 Vt. 195; Casey v. Gregory, 13 B. Mon. 505, 56 Am. Dec. 581; Walker v. McKnight, 15 B. Mon. 467, 61 Am. Dec. 190; Gibson v. Lyon, 115 U. S. 439; Beidler v. Friedell, 44 Ark. 411; Walker v. Goldsmith, 14 Or. 125; Fowler v. Poor, 93 N. C. 466; Edwards v. Halbert, 64 Tex. 667.

title. In other courts, however, probate sales are treated as indulgently as other judicial sales.¹ This is, perhaps, more universally true of guardians' sales than of those made by executors or administrators, for the reason that the inclination of the courts is to regard a sale made by a guardian as having been applied for and made by the ward himself acting through his agent, selected by himself or by the court, and hence the sale will be sustained as against such irregularities as do not involve any act of bad faith or of oppression on the part of the purchaser.²

It is sometimes said that a sale made under a decree must pursue the directions therein contained, that a departure from these directions renders the sale void.³ But to invoke this rule the departure must be of a very material character, and must, we think, be a departure which has not been approved by a decree of confirmation entered in the court which ordered and had supervision of the sale.⁴ In truth, a court is not absolutely bound by the terms of its order or decree respecting the mode of a sale. It may, though the sale is directed by it, refuse confirmation if it appears that the mode was one calculated, under the circumstances, to result in a sacrifice of the property, that such result has been realized, and that a new sale in a different mode may be more equitable.⁵ If the court has power to direct the terms of the sale in the first instance it may change them afterwards, and if an officer or other agent of the law, or

¹ *Harris v. Lester*, 80 Ill. 307; *Price v. Winter*, 15 Fla. 606; *Mulford v. Beveridge*, 78 Ill. 455; *Patterson v. Lemon*, 50 Ga. 231; *Gage v. Schroder*, 73 Ill. 44; *Spring v. Kane*, 86 Ill. 580; *Goodbody v. Goodbody*, 95 Ill. 456; *Moody v. Butler*, 63 Tex. 210; *Higgins v. Reed*, 48 Kan. 272; *Howbert v. Heyle*, 47 Kan. 58.

² *Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 390; *Kendrick v. Wheeler*, 85 Tex. 247.

³ *Williamson v. Berry*, 8 How. (U. S.) 544; *Jarboe v. Colvin*, 4 Bush, 70; *Cofer v. Miller*, 7 Bush, 545.

⁴ *Welch v. Louis*, 31 Ill. 446; *McGavock v. Bell*, 3 Coldw. 512.

⁵ *Freeman on Executions*, sec. 304f; *Deford v. McWatty*, 82 Md. 168.

of the court in making a sale, departs from the directions of the decree, the court may, nevertheless, by confirming the sale, ratify his action, provided always that the terms so ratified are such as the court had power to impose in the first instance.¹

§ 22. Failure to Give Additional Bond, or to Take Oath Concerning the Sale.—The granting of a license to sell real estate imposes a duty and also a pecuniary responsibility on the guardian or administrator in addition to the duty and responsibility otherwise attached to his office. This duty is to use his best efforts to make an advantageous sale of the property. This responsibility is to properly account for and pay over the proceeds of the sale. To insure a greater fidelity in performing this duty, some statutes have prescribed an oath to be taken before entering upon any of the proceedings necessary to precede the sale. To provide against any misappropriation of the proceeds of the sale, the statutes very generally exact an additional bond from the guardian, executor or administrator. The fact that a sale was made, or that the time or place thereof was selected in advance of the taking of this oath, has, in every case coming within our observation, been decided to be fatal to the purchaser's title.² The same conclusion has been reached in several cases where sales were made without the giving of the additional bond.³ So it has been said

¹ *Farmers' L. Co. v. Oregon P. R. R. Co.*, 28 Or. 44.

² *Campbell v. Knights*, 26 Me. 224, 45 Am. Dec. 107; *Wilkinson v. Filby*, 24 Wis. 441; *Parker v. Nichols*, 7 Pick. 111; *Blackman v. Bauman*, 22 Wis. 611; *Williams v. Reed*, 5 Pick. 480; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Thornton v. Mulquinne*, 12 Iowa, 549; *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394.

³ *Wiley v. White*, 3 Stew. & P. 355; *Currie v. Stewart*, 26 Miss. 646; *Babcock v. Cobb*, 11 Minn. 347; *Loeb v. Struck* (Ky.), 42 S. W. Rep. 401; *Rucker v. Dyer*, 44 Miss. 591; *Perkins v. Fairfield*, 11 Mass. 226; *Cohea v. State*, 34 Miss. 178; *Hamilton v. Lockhart*, 41 Miss. 460; *Washington v. McCaughan*, 34 Miss. 394; *Williams v. Morton*, 38 Me. 47, 61 Am. Dec. 229; *Barnett v. Bull*, 81 Ky. 127; *Williamson v. William-*

when the statute requires the approval of a bond by a judge of the court, that it was not, in contemplation of law, any bond at all until such approval, and that a sale upon it is void.¹ In most of the cases where sales were held void for

son, 3 S. & M. 715, 41 Am. Dec. 636. For application of a similar rule in partition suits, see *Freeman on Co-tenancy and Partition*, sec. 466.

¹ *Bachelor v. Korb*, 58 Neb. 122, 76 Am. St. Rep. 70. The court, in its decision in this case, in announcing its conclusion and explaining another decision cited as in opposition thereto, said: "In this connection it is said by the defendant in error that the failure of the guardian to have the bond executed by him approved by the judge of the district court was an irregularity merely. The answer to this is, if it was an irregularity it was such a one as the statute in effect prescribes shall avoid the sale. Another contention of the defendant in error is that the provision of the statute requiring this bond to be approved by the judge of the district court is directory merely, and that this court held in *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627, that such a bond need not be approved by the judge of the district court. The requirement of the statute that the district court shall approve this bond is not directory, but it is mandatory; and this court did not hold in *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627, or in any other case, either that the statute requiring this bond to be given was directory, or that, if given, and not approved by the judge, his failure to approve it was immaterial. The *Myers-McGavock* case was an action in ejectment by heirs. The defendants to that action claimed under a sale made by a guardian. It was insisted that that sale was void because the guardian had not given a bond approved by the judge granting the license as required by statute. Answering this objection we said: 'A bond in proper form and with proper sureties was executed and filed in the court in the proceeding as required by the statute; but the record of the proceeding in which the license to sell the real estate of the wards was granted does not show that this bond was formally approved by the judge who granted the license. It is now claimed that this silence of the record is conclusive evidence that the bond was not approved by the judge, and his failure to formally approve the bond renders the entire proceeding void. On the trial of the case at bar the defendants proved by the attorney who conducted the proceeding on behalf of the guardian that the bond was, in fact, presented to and approved by the presiding judge. The fact of the approval of the bond, like any other fact, might be proved by the best evidence attainable. We are of opinion, however, that in this collateral proceeding the guardian's deed could not be declared void because the bond filed for the purpose of obtaining the license to sell the real estate was not formally approved.' *Emery v. Vroman*, 19 Wis. *689, (724), 88 Am. Dec.

the failure to take the oath or to give the bond, they had been confirmed by the court. Upon principle, the failure to file an additional bond must be regarded as an irregularity merely. The only answer to this contention is to say, as did the courts in some of the States, that the jurisdiction of the probate court is defined by statute, that it has no common-law jurisdiction; that its jurisdiction is special and limited, and that it can act only in the mode directed by statute, and hence it is claimed that, though it expressly makes an order excusing an executor or guardian from giving a bond, yet if it errs in so doing its order must be disregarded as absolutely void, and can lend no support to a sale made in reliance thereon.¹ We think, however, that at least in those States where the jurisdiction of the probate court is more ample, or where its exercise is confided to courts having general jurisdiction, they cannot be regarded as acting beyond their authority, either in expressly excusing the filing of a bond or in confirming a sale in the absence of such filing, whether before excused or not, and that any

726; *Pursley v. Hayes*, 22 Iowa, 11, 92 Am. Dec. 350; *Hamiel v. Donnelly*, 75 Iowa, 93.' This is not a holding that the approval of the guardian's bond by the judge granting him the license to sell is not an absolutely essential thing. The statute does not prescribe what shall constitute an approval of a guardian's bond to sell his ward's real estate. It does not declare what shall be the only evidence of the judge's approval of such bond. A formal approval of a bond would, perhaps, consist in the judge's writing on the bond 'approved' or 'this bond approved,' or some such words, and signing his name. In the *Myers-McGavock* case the bond was actually presented to the judge, and the fact that he approved it was established by oral evidence—the best and only evidence attainable—and we held that that was sufficient, and that the sale would not be declared void, not because the judge had not approved the bond, but because he had not formally approved it; that is, that the evidence that he approved it did not appear upon the bond in writing. In the case at bar, the bond was never presented to the judge who granted the guardian license to sell. It was never approved by him in any manner whatever. He testified as a witness that the bond was never presented to him nor approved by him."

¹ *Snow v. Russell*, 93 Me. 362, 74 Am. St. Rep. 350.

error or irregularity of this kind should be deemed cured by the subsequent confirmation of the sale.¹

In New York, the filing of the original bond, on the granting of letters of administration, is not a jurisdictional matter.² The issue of letters without it is valid. The failure of a master in chancery to file his bond cannot be raised in a collateral suit to avoid a sale made by him and confirmed by the court.³

In Indiana, a sale made without giving the bond required cannot be avoided collaterally when made by a guardian, if he has duly accounted for the proceeds. If, on the other hand, such proceeds have been lost to the ward, owing to the omission of the bond, he may treat the sale as void.⁴ It thus appears to be the duty of the purchaser in that State either to assure himself that the requisite bond has been given, or else to take measures looking to the proper application of the proceeds of the sale. In some of the States the legislature has, by statute, declared that probate sales shall not be avoided on account of "any irregularity in the proceedings, provided it should appear: 1, that the executor was licensed to make the sale by the county court having jurisdiction; 2, that he gave a bond that was approved by the judge of the county court, in case a bond was required, upon granting a license; 3, that he took the oath therein prescribed; 4, that he gave notice of the time and place of sale as therein prescribed; and 5, that the premises were sold accordingly, and the sale confirmed by the court, and that they were held by one who purchased them in good faith."⁵ These statutes, while professedly

¹ *Higgins v. Reed*, 48 Kan. 272; *Watts v. Cook*, 24 Kan. 278; *Howbert v. Herkle*, 47 Kan. 58; *Foster v. Birch*, 14 Ind. 445; *Lockhart v. John*, 7 Pa. St. 137; *Arrowsmith v. Hormoning*, 42 Ohio St. 254; *Moody v. Butler*, 63 Tex. 210; *Hamiel v. Donnelly*, 75 Iowa, 93.

² *Bloom v. Burdick*, 1 Hill, 130, 37 Am. Dec. 299.

³ *Nicholl v. Nicholl*, 8 Paige, 349.

⁴ *McKeever v. Ball*, 71 Ind. 398.

⁵ *Melms v. Pfister*, 59 Wis. 194.

in the interest of purchasers in good faith at probate sales, probably operate to the contrary, as they seem to recognize five classes of irregularity as fatal, when only the first of the five was clearly and necessarily fatal, independent of such statute. In States controlled by these or similar statutes, we see no escape from the conclusion that a sale, made in the absence of the bond required by law, or the order of the court, is void. But, unless supported by some statute, the decisions declaring that the failure to give such bond nullifies the sale, are not sustainable at all. The jurisdiction of the court is in nowise connected with the giving of the bond; and the omission of such bond is manifestly a simple irregularity affording sufficient reason for refusing to approve the sale, but of no consequence to a purchaser in good faith, except in so far as it may lead the court to withhold its approval of his purchase.¹ Even in those States where the giving or approval of a bond is required, it will probably be presumed from the confirmation of the sale, in the absence of any other evidence upon the subject, that such bond was given and approved, though it is not found among the files of the court, or though so found, no approval is indorsed thereon or annexed thereto.²

§ 23. **The Necessity for a Valid Execution.**—Though a judgment at law is entered, no officer has any authority to enforce it without a writ of execution. A sale, when no such writ had issued, would, unquestionably, be void. In chancery the decree of sale may of itself constitute a sufficient authority for its own execution.³ The usual custom in chancery is to deliver a certified copy of the decree to

¹ Wyman v. Campbell, 6 Porter, 319, 31 Am. Dec. 677; Palmer v. Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; Bunce v. Bunce, 59 Iowa, 533; Watts v. Cook, 24 Kan. 278; Mobberly v. Johnson, 78 Ky. 273; McKinney v. Jones, 55 Wis. 39; Hamiel v. Donnelly, 75 Iowa, 93.

² Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627; Saul v. Frame, 3 Tex. Civ. App. 596.

³ Karnes v. Harper, 48 Ill. 527. See Freeman on Executions, sec. 47a (3d Ed.), p. 215.

the person charged by the court or by law with the duty of making the sale. Under the practice for the foreclosure of mortgages in California, the sheriff is authorized to proceed on receiving an execution or a certified copy of the decree. If he acts in the absence of both, his acts are void.¹ Some of the statutes require copies of orders of sale in probate to be delivered to the administrator or guardian as his authority to sell, and others contain no direct provision on the subject. We have never known of a sale being questioned on the ground that no copy of the license to sell had been delivered to the administrator. An execution is invalid and cannot support a sale, unless it is issued out of a court,² and by an officer³ competent to issue it. It is not sufficient that the court be competent to issue execution in some cases or upon some judgment. It must be competent to issue the writ in question, and, except when specially authorized by statute, one court cannot issue execution upon the judgment of another, and a writ so issued is void.⁴ The officer must also be authorized to issue the particular writ in question. It is not sufficient that he has power to issue writs on other judgments or from other courts.⁵ Neither is it sufficient that he was authorized to issue the writ at some particular time if his authority has terminated, as where he was the clerk of the court, but his official term has expired,⁶ except, perhaps, where he retains possession of the office under such circumstances as to constitute an officer *de facto*. The writ must also be on a

¹ Heyman v. Babcock, 30 Cal. 367.

² Freeman on Executions, sec. 15. After a court has been established an execution purporting to be issued out of it is a nullity. Harris v. Corriell, 80 Ill. 54.

³ Freeman on Executions, sec. 23.

⁴ Freeman on Execution, sec. 15; Willamette, etc., Co. v. Hendrix, 28 Or. 485, 52 Am. St. Rep. 800; Lovelady v. Burgess, 32 Or. 418.

⁵ Chandler v. Calcord, 1 Okla. 260; Richards v. Belcher, 6 Tex. Civ. App. 284.

⁶ O'Donnell v. Merguire (Cal.), 60 Pac. Rep. 981.

judgment capable of enforcement by execution. It is not such a judgment unless it is final and in form sufficient to enable the court to determine by inspection what has been awarded, from whom the award is to be recovered, and to whom it is due.¹ The judgment must also warrant the kind of writ issued. An execution *in personam* cannot be issued on a judgment *in rem*, and though the judgment is in form *in personam*, if it is enforceable against particular property only, as where the defendant is out of the jurisdiction of the court and his property has been attached, but jurisdiction of his person never obtained, an execution *in personam* is not justified, and, if issued, must, in its operation, be restricted to the property attached, and a sale thereunder of any other is necessarily void.² A mere settlement of accounts or other finding that a sum of money is due, accompanied by a direction that it be paid into court, is not, in the absence of a statute specially authorizing it, enforceable otherwise than by committing for contempt, and hence does not support an execution issued thereon.³ The judgment must not be void nor satisfied.⁴ Its effect must not have been destroyed by its vacation or reversal.⁵ The de-

¹ Freeman on Execution, sec. 16.

² Kelley v. Kelley, 161 Mass. 111, 42 Am. St. Rep. 389; Gue v. Jones, 25 Neb. 634; Renier v. Hurlburt, 81 Wis. 24, 29 Am. St. Rep. 850.

³ Freeman on Execution, sec. 17; Kingsbury v. Hutton, 140 Ill. 603; United States T. Co. v. Stevens, 67 Md. 156.

⁴ Freeman on Executions, secs. 19 and 20. That a sale under a satisfied judgment is void is affirmed in French v. Edwards, 5 Saw. C. C. 266; Drefall v. Tuttle, 42 Iowa, 77; Finley v. Gant, 8 Baxt. 148; Wood v. Colvin, 2 Hill, 566, 38 Am. Dec. 588; Frost v. Yonker's S. B., 70 N. Y. 560; Doe v. Ingersoll, 11 S. & M. 249, 49 Am. Dec. 57; Murrell v. Roberts, 11 Ired. 424, 53 Am. Dec. 449. In some States such sales are upheld in favor of innocent purchasers. Van Campen v. Snyder, 3 How. (Miss.) 66, 32 Am. Dec. 311; Hoffman v. Strohecker, 7 Watts, 86, 32 Am. Dec. 740; Reed v. Austin, 9 Mo. 722, 45 Am. Dec. 336; Boren v. McGeehee, 6 Port. 432, 31 Am. Dec. 695. A purchaser buying at a sale under a satisfied judgment, with notice of facts sufficient to put him upon inquiry, unquestionably gets no title. Kezar v. Elkins, 52 Vt. 119; Weston v. Clark, 37 Mo. 573.

⁵ Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176.

fendant in execution must also be a person or corporation against which an execution may issue.¹ Thus judgments are sometimes authorized to be entered against a county or a State for the purpose of establishing its liability as a foundation for appropriate proceedings for its enforcement, but execution cannot properly issue thereon, and if issued cannot be enforced by a levy upon or sale of its property.² A somewhat similar consequence follows the entry of a judgment against an administrator or executor where its effect is, by law, merely to establish a claim against the decedent, to be paid in due course of administration.³ The execution must not be forged, either wholly nor in any material part.⁴

§ 24. **The Times when Execution May Not Issue.**—By some statutes a plaintiff's right to execution does not exist immediately after the entry of the judgment, but remains in abeyance a specified period of time. The issue of execution before the expiration of this time is, in most States, a mere irregularity, not of sufficient gravity to render the sale void.⁵ The same rule is usually applied to writs issued contrary to agreement or pending a stay of execution. They will be vacated on motion. But if the defendant takes no steps to obtain their vacation, or to set aside sales made thereunder, the latter will be treated as valid.⁶ This

¹ Freeman on Executions, sec. 22.

² *Pekin v. McMahon*, 154 Ill. 141, 45 Am. St. Rep. 114; *Emery County v. Brieson*, 14 Utah, 328, 60 Am. St. Rep. 898.

³ Freeman on Execution, sec. 22; *Cowles v. Hall*, 113 N. C. 359.

⁴ Freeman on Executions, secs. 23, 47; *Silvan v. Coffee*, 20 Tex. 4, 70 Am. Dec. 371.

⁵ *DeLoach v. Robbins*, 102 Ala. 288, 48 Am. St. Rep. 46; *Walthrop v. Friedman*, 90 Ala. 157, 24 Am. St. Rep. 775; *Wheeling P. Co. v. Levi*, 48 La. An. 777; *Mason, etc., Co. v. Killogh M. Co.*, 45 S. C. 11; *Freeman on Executions*, sec. 25; *Stewart v. Stocker*, 13 Serg. & R. 199, 15 Am. Dec. 589. But in Massachusetts a premature writ is void. *Pennalman v. Cole*, 8 Metc. 496.

⁶ Freeman on Executions, secs. 26, 33; *Swiggart v. Harber*, 4 Scam. 364, 39 Am. Dec. 418.

remark is equally true of writs issued and sales made in disobedience of injunctions.¹ At common law execution could not regularly issue after a year and a day subsequent to the entry of judgment, without a revivor by *scire facias*. A writ issued in violation of this rule is not void.² There is little dissent from this view where a proceeding should have been instituted to revive a judgment after it had become dormant either by *scire facias* or by some statutory proceeding of the same general character.³ Proceedings by *scire facias* are, however, obsolete in a majority of the States. In them statutes provide that, after the lapse of a time specified, execution can issue only by leave of the court upon motion made therefor. Still, as the right to issue execution is not extinguished, its issue without the previous order of the court must be deemed a mere irregularity, and will hence support an execution sale, unless defendant in the writ obtains some order vacating it.⁴ The rule must be otherwise where the right to execution has terminated, and the court out of which it issues has not been given any power to direct or sanction such issuing. In such a case it must be void, whether supported by an order of the court or not.⁵

At common law an execution could not regularly issue without revivor of the judgment by *scire facias*, after the

¹ *Rikeman v. Kohn*, 48 Ga. 183; *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

² *Freeman on Executions*, secs. 29, 30; *Riddle v. Turner*, 52 Tex. 145. *Contra*: *Godbold v. Lambert*, 8 Rich. Eq. 155, 70 Am. Dec. 192; *Hoskins v. Helm*, 4 Litt. 309, 14 Am. Dec. 133.

³ *DeLoach v. Robbins*, 102 Ala. 288, 48 Am. St. Rep. 46; *Gardner v. Mobile, etc., R. R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84; *Herzberg v. Hollis*, 119 Ala. 496; *Leonard v. Broughton*, 120 Ind. 536, 16 Am. St. Rep. 347; *Gillespie v. Switzer*, 43 Neb. 772; *Sherrard v. Johnston*, 193 Pa. St. 166, 74 Am. St. Rep. 680. *Contra*: *Davis v. Comer*, 108 Ga. 117, 75 Am. St. Rep. 33.

⁴ *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54; *Eddy v. Coldwell*, 23 Or. 163, 37 Am. St. Rep. 672.

⁵ *Ante*, § 7a.

death of a sole plaintiff or of a sole defendant. In many of the United States, while the proceeding by *scire facias* is no longer necessary, statutes have been enacted requiring, when a sole plaintiff has died after judgment, that his administrator or executor disclose the fact of his death to the court either by some motion, or by filing a copy of letters testamentary, or of administration, or of an order making the appointment. The issue of a writ without the revivor of the judgment by *scire facias*, or by motion or other statutory proceeding, where the writ of *scire facias* is no longer the proper remedy, is a more serious matter than its issue on a dormant judgment. If an execution is issued and tested after the death of a sole plaintiff, the authorities are very evenly divided upon the question whether it is void or irregular only.¹ But if it issues and bears *teste*, after the death of a sole defendant, the authorities almost, but not quite unanimously, adjudge it void.² But the death of one of several plaintiffs or defendants neither suspends nor destroys the right to issue execution.³ Whether a writ tested before the death of the defendant, but actually issued afterward, may be levied on lands and a valid sale made thereunder, cannot be regarded as finally settled. In one case where the question was not necessarily involved, it was intimated on the authority of Tidd's Practice that, when the right to take lands in execution was established, it followed that they might be taken under

¹ Freeman on Executions, sec. 35; Seeley v. Johnson, 61 Kan. 337, 78 Am. St. Rep. 314.

² Freeman on Executions, sec. 35; Clingman v. Hophie, 78 Ill. 152; Welch v. Rattern, 47 Iowa, 147; Collier's Admr. v. Widdham, 27 Ala. 291, 62 Am. Dec. 767; Montgomery v. Realhafer, 85 Tenn. 668, 4 Am. St. Rep. 780; Cunningham v. Burk, 45 Ark. 267; Boyle v. Maroney, 73 Iowa, 70, 5 Am. St. Rep. 657; Burge v. Brown, 5 Bush, 535, 96 Am. Dec. 369; Blanks v. Rector, 24 Ark. 496. In other cases writs so issued were adjudged to be voidable only, and not void. Shelton v. Hamilton, 23 Miss. 496, 57 Am. Dec. 149; Harrington v. O'Reilly, 9 S. & M. 216, 48 Am. Dec. 704; Elliott's Lessee v. Knott, 14 Md. 121, 74 Am. Dec. 519.

³ Freeman on Executions, sec. 36.

the same circumstances as personal property, and hence, that if a writ tested before, but issued after the death of the defendant, can be levied upon his goods and chattels; his lands may also be subject to an *elegit* issued under like circumstances,¹ and under the authority of this case it was decided that the dissolution of a corporation after the *teste* of an execution against it, but before the actual levy thereof, did not render invalid the sale of its lands under such writ.² In New York, on the other hand, it has been insisted that the permitting the issuing of a writ of execution after the death of the defendant, because tested before, applied only to writs of *feri facias*, under which no levy upon real property could be made at the common law; and hence, that the real property of a deceased defendant does not come within the rule permitting proceedings under writs issued after his death but tested before.³

If an execution issues after a judgment is pronounced and before its entry by the clerk, the writ is not void. If necessary to maintain proceedings taken under the writ, the court would doubtless order the entry of the judgment *nunc pro tunc*.⁴ If, however, the writ issues in anticipation of a judgment not yet ordered by the court, or upon a judgment of confession not yet perfected by the clerk, a more serious question arises. In such a case the writ, at the time of its issue and until the judgment is pronounced or perfected, is unquestionably void; and it seems that no validity can be infused into the writ by the subsequent rendition of the judgment.⁵ In some of the States, executions may be issued by the clerk of a superior court upon transcripts of

¹ *Erwin v. Dundas*, 4 How. 58.

² *Boyd v. Hankinson*, 83 Fed. Rep. 876.

³ *Stymetz v. Brooks*, 10 Wend. 206; *Wallace v. Swinton*, 64 N. Y. 188; *Wood v. Morehouse*, 45 N. Y. 368.

⁴ *Graham v. Lynn*, 4 B. Mon. 17, 39 Am. Dec. 493.

⁵ *Hathaway v. Howell*, 54 N. Y. 97; on second trial, 6 Thomp. & C. 453, 4 Hun, 270.

judgments of justices of the peace. The substantial performance of the various acts designated by statute, with respect to the transcript and the filing thereof, appears to be essential to the issuing of the writ and the maintenance of titles founded upon it.¹ The issue of a *venditioni exponas* when a *feri facias* was ordered is a nullity. "The clerk has no power to issue any other writ than that prescribed in the judgment."²

§ 24a. **A Loss or Suspension of the Right to Enforce an Execution Rightfully Issued** may occur though the judgment is neither satisfied, vacated, reversed, nor enjoined, and must be conceded to remain in full force. The only question which we shall here consider is whether the death of a sole plaintiff or of a sole defendant, after the writ has issued, prevents further proceedings under it or renders them subject to attack. That the death of a sole plaintiff, after the issuing of a writ, did not constitute any reason for not proceeding with its execution must be conceded.³ As to personal property the same concession must be made, for the reason that "from its *teste* at the common law and from its delivery to the officer under the statutes, where the common-law fiction of relation to the day of its *teste* has been abolished, the writ is deemed to be in process of execution; and when its execution is commenced during the life of the defendant, either in fact or in contemplation of law, it must proceed."⁴ "With respect to the real estate of the defendant, the rule, according to the decided preponderance of the authorities, is the same as that applicable to his personal estate. An *elegit* upon the

¹ *Bigelow v. Booth*, 39 Mich. 622; *Wooters v. Joseph*, 137 Ill. 113, 31 Am. St. Rep. 355; *Campbell v. Smith*, 116 Ala. 290, 67 Am. St. Rep. 114; *Hobson v. McCambridge*, 130 Ill. 367.

² *Hurst v. Liford*, 11 Heisk. 622.

³ *Freeman on Executions*, sec. 37.

⁴ *Freeman on Executions* (3d Ed.), p. 144.

teste in the defendant's lifetime may, after his death, be extended on his real estate, and the same is true of any other writ, so tested, which may be employed to make real estate answerable for the defendant's debt."¹

§ 25. **Writs of Execution Must be Sufficient in Form.**—

The necessity for a writ of execution cannot be answered by a writ called by that name, but substantially defective in form. It must at least purport to proceed from some competent authority; must show what judgment it is designed to enforce, and must direct the officer to execute or satisfy the judgment.² But there are various formal matters usually embodied in writs of execution, and in respect of which an error or omission is not necessarily fatal. It should have that part commonly known as the style of the writ, but an error or omission therein is not fatal,³ except, perhaps, in Illinois.⁴ It should be directed to the proper officer who, where the sheriff is disqualified, is the coroner, and if directed to the coroner or jailer, and executed by the latter when the former is not disqualified, a levy and sale thereunder are probably void.⁵ Every writ of execution should contain words commanding the officer to do the acts required to be done by him to accomplish the satisfaction or other enforcement of the judgment. The effect of any substantial omission is doubtful. On the one hand it is insisted, and we think with the better reason, that the writ is

¹ Freeman on Executions (3d Ed.), p. 145; *Rain v. Young*, 61 Kan. 428, 78 Am. St. Rep. 325; *Benners v. Rhinehart*, 107 N. C. 765, 22 Am. St. Rep. 909; *Bigelow v. Renker*, 25 Ohio St. 542; *Montgomery v. Realhafer*, 85 Tenn. 668, 4 Am. St. Rep. 780. *Contra*: *Stymetz v. Brooks*, 10 Wend. 210; *Wood v. Morehouse*, 45 N. Y. 373.

² Freeman on Executions, secs. 39 to 41; *Brown v. Duncan*, 132 Ill. 413, 22 Am. St. Rep. 545.

³ Freeman on Executions, sec. 39.

⁴ *Sidwell v. Schumacher*, 99 Ill. 433.

⁵ Freeman on Execution (3d Ed.), sec. 40; *Gowdy v. Sandus*, 88 Ky 346.

amendable, and hence will support proceedings taken under it,¹ and on the other that it is void.²

A mistake or omission in designating the return day,³ or in the attesting clause,⁴ are not of sufficient consequence to defeat an execution sale. In some courts an execution, without a seal (where one is required) is void; in others it is irregular merely.⁵ The effect of an omission from a writ of the signature of the officer issuing it is not settled. With respect to justices of the peace, the tendency of a majority of the courts is to treat executions issued by them as void unless signed.⁶ Where the writ is from a court of record, and is otherwise perfect in form, and has the seal of the court impressed thereon, there can be no reasonable doubt of the authority by which it was issued, and the omission of the signature of the clerk issuing it seems to be merely an amendable irregularity,⁷ and that a defendant knowing the defect or being chargeable with knowledge of it, who fails to make some seasonable objection, cannot at a latter date insist with success that it is void;⁸ but there is no doubt

¹ *Gardner v. Mobile, etc.*, R. R. Co., 102 Ala. 625, 48 Am. St. Rep. 84; *Cheese v. Plymouth*, 20 Vt. 469, 50 Am. Dec. 52; *Freeman on Executions* (3d Ed.), sec. 41.

² *Place v. Riley*, 91 N. Y. 1; *Capps v. Leachman*, 90 Tex. 499, 59 Am. St. Rep. 830.

³ *Freeman on Executions*, sec. 44; *Brevard v. Jones*, 50 Ala. 221; *Youngblood v. Cunningham*, 38 Ark. 571.

⁴ *Freeman on Executions*, sec. 45; *Douglas v. Haberstro*, 88 N. Y. 611; *Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341.

⁵ *Freeman on Executions*, sec. 46; *Roseman v. Miller*, 84 Ill. 297; *Taylor v. Taylor*, 83 N. C. 116; *Woolford v. Dugan*, 2 Ark. 131, 35 Am. Dec. 52, and note; *Corwith v. State Bank*, 11 Wis. 430, 78 Am. Dec. 719; *Weaver v. Peasley*, 163 Ill. 254, 54 Am. St. Rep. 469; *Gordon v. Bodwell*, 59 Kan. 51, 68 Am. St. Rep. 341. *Contra*, that the writ is amendable and not void, *Freeman on Executions*, sec. 70; *Hall v. Lackmond*, 50 Ark. 113, 7 Am. St. Rep. 84.

⁶ *Short v. State*, 79 Ga. 550; *Wooters v. Joseph*, 137 Ill. 113, 31 Am. St. Rep. 355; *Huggins v. Ketchum*, 4 Dev. & B. 414.

⁷ *Jett v. Shinn*, 47 Ark. 373; *McCormack v. Mason*, 1 S. & R. 92.

⁸ *Rawles v. Jackson*, 104 Ga. 593, 69 Am. St. Rep. 185.

that in some of the States an unsigned writ is void.¹ The most frequent mistakes in the issue of writs are made in attempting to describe judgments. Sometimes the description leaves uncertain what the judgment is, and at other times it describes the judgment as it is not. An error of the former class may leave uncertain what the officer should do under the writ, or for whose benefit he is to do it. A writ failing to attempt any description of the judgment, but merely commanding the officer to make designated sums of money out of the property of persons named therein, and to make due return, was held to be absolutely void, on the ground that "it does not show for whose benefit it issued. It does not show upon what judgment or decree it is based, nor out of what court issued. An execution must show for and against whom it issues, the amount or amounts to be taken from the latter for the benefit of the former, and should also show the date at which, and the court where, the judgment was rendered."² Where an attempt is made in a writ in describing the judgment, it may fail of success, either because of entirely omitting or incorrectly stating necessary elements of description. The omission of a date, or of a name, or of any other element of description, cannot render the writ void, if, from it as a whole, including the indorsements thereon, there can be no reasonable doubt respecting the judgment for the enforcement of which it was issued.³ The name of the plaintiff or of the defendant may be incorrectly stated, or the amount or the judgment may vary from the sum for which execution issued. These mistakes and variances are amendable. If no amendment is made, and no objection to the form of the writ is interposed by a motion to quash or vacate it, it must be treated

¹ *Hernandez v. Drake*, 81 Ill. 34; *Dearborn L. Co. v. Chicago*, 55 Ill. App. 38.

² *Brown v. Duncan*, 132 Ill. 413, 22 Am. St. Rep. 545.

³ *Smith v. Bell*, 107 Ga. 800, 73 Am. St. Rep. 151; *McDonald v. Fuller*, 11 S. D. 355, 74 Am. St. Rep. 815.

as valid, unless the variance is so great that it appears not to be issued upon the judgment which is produced in its support.¹ An execution not issued in the name of the people of the State, nor directed to the sheriff, is amendable, and a sale thereunder is valid.²

§ 26. **Sales in the Absence of Levies.**—When a judicial sale is made by virtue of an order or license of sale, no levy is necessary.³ “In every case in which from the entry of a judgment it follows that specific real property may be sold for its satisfaction, and in which the writ issued is either in express terms or in legal effect a special execution authorizing the sale of specific real property, either because the judgment expressly directed such sale, or because, by reason of a pre-existing attachment, such property has been impressed with the lien for the satisfaction of the judgment, there can be no necessity for any purpose of any levy on such property under the writ of execution.”⁴ The same rule holds good with respect to execution sales of real estate, where the judgment itself is a lien on the real property of the defendant.⁵ Personal property must be levied upon, or in some way subjected to the control of the officer, be-

¹ Freeman on Executions, secs. 42, 43; Harlan v. Harlan, 14 Lea, 107; Haskins v. Wallet, 63 Tex. 213; Alexander v. Miller's Ex., 18 Tex. 893, 70 Am. Dec. 314; Wilson v. Campbell, 33 Ala. 249, 70 Am. Dec. 586; Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404; Hunter v. Roach, 95 N. C. 106; DeLoach v. Robbins, 102 Ala. 288, 48 Am. St. Rep. 46; Griffith v. Milwaukee, etc., Co., 92 Iowa, 634, 54 Am. St. Rep. 513; Anderson v. Gray, 134 Ill. 550, 23 Am. St. Rep. 696; Fredlander v. Fenton, 180 Ill. 312, 72 Am. St. Rep. 207; Stackhouse v. Zuntz, 41 La. Ann. 415; Holmes v. Jordan, 163 Mass. 137; Berry v. Gates, 175 Mass. 373.

² Hibbard v. Smith, 50 Cal. 511; Pecotte v. Oliver, 2 Idaho, 230. But see *contra*, Jones v. Hess (Tex. Civ. App.), 48 S. W. Rep. 46.

³ Freeman on Executions, sec. 280; Lenhardt v. Jennings, 119 Cal. 192.

⁴ Freeman on Executions, sec. 280; Lenhardt v. Jennings, 119 Cal. 192; Southern C. L. Co. v. Hotel Co., 94 Cal. 217, 28 Am. St. Rep. 115; McFall v. Buckeye, etc., Assn., 121 Cal. 468, 68 Am. St. Rep. 47; Burkett v. Clark, 46 Neb. 466.

⁵ Farrior v. Houston, 100 N. C. 369, 6 Am. St. Rep. 597; Freeman on Executions, sec. 280.

fore a valid sale can be made under execution.¹ As between the parties the defendant can waive a levy.² With respect to real estate, upon which a levy has neither been made nor waived, the authorities are very evenly divided as to the validity of an execution sale, some claiming that it is irregular merely, others that it is void.³ Among the sales made in the absence of levies must be included those sales based upon supposed or attempted levies in which the proceedings are so defective that no levy has in contemplation of law been made, or, if made, must, for some reason, be declared void. If a levy is upon real property, and the statutes of the State have prescribed the manner in which it shall be made, inquiry must be made by persons intending to purchase at execution sales for the purpose of determining whether the acts disclosed by the officer's return, or otherwise known to exist, are sufficient to constitute a valid levy. "So far as the decisions have gone they indicate that the statutes will be rather strictly construed, and that any substantial departure from their requirements is not consistent with a valid levy."⁴

§ 27. **Sales Without Inquisition or Appraisement.**—Some statutes require an inquisition or appraisement of real estate to precede its sale under execution, and seek to avoid the great sacrifice sometimes attending compulsory sales, by forbidding any sale which does not realize a certain proportion of the appraised value. Sales made without any appraisement, or for a less proportion of the appraised

¹ *Yomans v. Bird*, 81 Ga. 340; *Freeman on Executions*, sec. 274.

² *Greer v. Wintersmith*, 85 Ky. 516, 7 Am. St. Rep. 613.

³ *Freeman on Executions*, sec. 274; *Frink v. Roe*, 70 Cal. 296; *Gordon v. Gilfoil*, 99 U. S. 168; *Bledsoe v. Willingham*, 62 Ga. 550; *Wood v. Augustine*, 61 Mo. 46; *Elliott v. Knott*, 14 Md. 121, 74 Am. Dec. 519.

⁴ *Freeman on Executions*, sec. 280; *Brusie v. Gates*, 80 Cal. 467; *Rudolph v. Saunders*, 111 Cal. 235; *Hall v. Stevenson*, 19 Or. 153, 20 Am. St. Rep. 803; *Robertson v. Hoge*, 83 Va. 124.

value than authorized by law, are usually, but not universally, held void.¹

In many of the States, administrators and guardians are required to have property appraised before selling it. In Louisiana, sales made in contravention of these statutes are thought to be void;² but we apprehend that they should be declared voidable merely; and, if confirmed by the court, as entirely valid.³ This is the view finally adopted by the Supreme Court of Missouri, where the sale was collaterally attacked,⁴ though it had previously expressed the opinion that such sales were void.⁵ The statutes of this State declare that no real estate of any minors shall be sold for less than three-fourths of its appraised value. In an action of ejectment the defendant resisted the recovery on the ground that the land sued for had been sold by the curator of the plaintiffs while they were minors under an order of the probate court. It appeared that the sale was for ten dollars, the appraised value of the property one hundred and fifty dollars, and that six years after the sale the same property had been sold by the purchaser for three thousand dollars. The judgment in favor of the defendant was by the supreme court reversed with direction to enter judgment for the plaintiff, on the ground that the probate court had no jurisdiction to approve the sale, that its order of approval was therefore *coram non judice* and void, and that the deed, as it showed these facts, was void on its face.⁶

¹ Freeman on Exccutions, secs. 284, 285; Maple v. Nelson, 31 Iowa, 322; Globe L. & T. Co. v. Wood, 58 Neb. 395; Brown v. Butters, 40 Iowa, 544. A sale under a forged waiver of inquisition is void. Zuver v. Clark, 104 Pa. St. 222.

² Curley's Succession, 18 La. Ann. 278. But a sale in probate to pay debts is not void in Louisiana, because for less than the appraisement. Stoltz's Succession, 28 La. Ann. 175; Hermann v. Fontelieu, 29 La. Ann. 502.

³ Bell v. Green, 38 Ark. 78; Neligh v. Keene, 16 Neb. 407; Apel v. Kelsey, 47 Ark. 413.

⁴ Noland v. Barrett, 122 Mo. 181, 43 Am. St. Rep. 572.

⁵ Strouse v. Drennan, 41 Mo. 298.

⁶ Carder v. Culbertson, 100 Mo. 269, 18 Am. St. Rep. 548.

§ 28. **Sales Void for Want of Notice of Sale.**—Some notice of the time and place of sale, and of the property to be sold, is obviously essential to the realization of its value. This notice is commonly required to be given by the statutes regulating judicial, execution and probate sales. Whether a compliance with this requirement is a prerequisite to the power to sell is uncertain. Undoubtedly a sale, without first giving the proper notice, would not be confirmed if the defect were known to the court. It would be vacated on motion, while the court had power to annul it by that kind of proceeding.¹ In a few of the States two notices are required to be given, one to the defendant in execution, and the other to the public. In Massachusetts, the statute directing notice to be given to the defendant has been held to be mandatory, and if the notice is not served, or is served in a manner other than that prescribed by statute, it is void.² “Elsewhere the rule is different. The failure to give the defendant notice of the levy of the writ, or of the time when his property will be offered for sale thereunder, is a mere irregularity which he waives if he does not urge it in due time, and this urging must ordinarily be by some attempt to prevent the sale before it takes place, or to vacate it afterwards and before a conveyance to the purchaser.”³ With respect to notice to the public commonly required to precede execution sales, “a very decided preponderance of authorities maintains this proposition: That the statutes requiring notice of the sale to be given are directory merely, and that the failure to give such notice cannot avoid the sale against any purchaser not himself in fault.”⁴

¹ Glenn v. Wootten, 3 Md. Ch. 514; Matter of McFeely, 2 Redf. 541; Helmer v. Rehm, 14 Neb. 219; Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753.

² Parker v. Abbott, 130 Mass. 25.

³ Freeman on Executions, sec. 285; Cowles v. Hardin, 101 N. C. 338, 9 Am. St. Rep. 36; Shaffer v. Bledsoe, 118 N. C. 279; Beam v. City of Brownsville, 91 Tex. 684.

⁴ Freeman on Executions, sec. 286; Ware v. Bradford, 2 Ala. 676, 36

With respect to executors,' administrators' and guardians' sales, the authorities are more evenly divided. On the one hand they maintain that the giving of notice for the time, and substantially in the manner directed by statute, is indispensable to a valid sale.¹ On the other hand, they insist that the existence of the notice and its sufficiency are legitimate subjects of inquiry, when the sale is reported for confirmation, but not afterwards.²

There seems to be more reason for sustaining probate sales made upon insufficient notice or without any notice whatever, than for sustaining sales so made upon execution, because the latter are not usually brought before the court for confirmation, while the former are reported to and considered by the court, and are not to be approved unless the proceedings are fair and regular. To attack a probate sale after confirmation, for the purpose of showing the absence

Am. Dec. 427; *Brooks v. Rooney*, 11 Ga. 423, 56 Am. Dec. 430; *Solomon v. Peters*, 37 Ga. 255; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Draper v. Bryson*, 17 Mo. 71, 57 Am. Dec. 257; *Minor v. Natchez*, 4 S. & M. 602, 43 Am. Dec. 488; *Burton v. Spiers*, 92 N. C. 503; *Maddox v. Sullivan*, 2 Rich. Eq. 4, 44 Am. Dec. 234, and note; *Smith v. Randall*, 6 Cal. 47, 65 Am. Dec. 475; *Evans v. Robberson*, 92 Mo. 192, 1 Am. St. Rep. 701; *Hendrick v. Davis*, 27 Ga. 167, 73 Am. Dec. 726; *Conley v. Redwine*, 109 Ga. 640, 77 Am. St. Rep. 398; *Moore v. Johnson*, 12 Tex. Civ. App. 694. *Contra*: *Hughes v. Watt*, 26 Ark. 228; *Lafferty v. Conn*, 3 Sneed, 221; *Herrick v. Ammerman*, 32 Minn. 544; *Prater v. McDonough*, 7 Lea, 670; *Henderson v. Hays*, 41 N. J. Law, 387; *Hinson v. Hinson*, 5 Sneed, 322, 73 Am. Dec. 129; *Russell v. Williamson*, 67 Ark. 80. For form and contents of notices of sale, see the note to *Hoffman v. Anthony*, 75 Am. Dec. 704 to 713.

¹ *Thomas v. Le Barron*, 8 Mete. 363; *Curley's Succession*, 18 La. Ann. 728; *Blodgett v. Hitt*, 29 Wis. 169; *Mountour v. Purdy*, 11 Minn. 384; *Gerhon v. Bestick*, 15 La. Ann. 697; *Hobart v. Upton*, 2 Saw. C. C. 302; *Hartley v. Croze*, 38 Minn. 328; *Tracy v. Roberts*, 88 Me. 310, 51 Am. St. Rep. 394.

² *Morrow v. Weed*, 4 Iowa, 77, 66 Am. Dec. 122; *Little v. Sinnett*, 7 Iowa, 324; *Minor v. Selectmen*, 4 S. & M. 602; *Bland v. Muncaster*, 24 Miss. 62, 57 Am. Dec. 162; *Hanks v. Neal*, 44 Miss. 212; *McNair v. Hunt*, 5 Mo. 301; *Cooley v. Wilson*, 42 Iowa, 428; *Hudgens v. Jackson*, 51 Ala. 514; *Moffitt v. Moffitt*, 69 Ill. 641; *Re Lehman's Succession*, 41 La. Ann. 987; *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369.

of, or defects in, the notice, involves the re-examination of an issue which has been once heard and determined by a court of competent jurisdiction, and the re-examination of which ought therefore to be forbidden.

§ 29. **By Whom the Sale May be Made.**—When a sale is to be made under a decree in chancery, the court may appoint some one as its agent or commissioner and invest him with power to make the sale.¹ A court is not divested of this power by a statute authorizing an officer or a particular class of officers to make such sales,² nor by the prayer of the complaint asking for a sale by the sheriff, nor by a general declaration in the constitution of the State that the legislature shall provide for the election or appointment of certain county officers (among whom sheriffs are enumerated), and prescribe their duties and fix their terms of office.³

A sale under execution must be made by a sheriff or constable, unless he is disqualified to act. He may, however, as in the performance of other ministerial duties, act by a duly authorized deputy.⁴ The officer must be one authorized to act at the place where the sale is made. Hence, an officer of one county cannot sell real property in another, and although the property to be sold consists of one tract, yet, if it is situate partly in two or more counties, an officer may sell that part only which lies within the county of which he is an officer, and a sale attempted to be made by him of lands outside of his county is void.⁵ The officer must not be interested in the sale nor otherwise disqualified from

¹ Freeman on Executions, sec. 291.

² *Coras v. Bertoulin*, 45 La. Ann. 160; *American, etc., Co. v. Northwestern, etc., Co.*, 53 Neb. 538; *Mayer v. Wick*, 15 Ohio St. 548; *McCrary v. Jones*, 36 S. C. 136; *Connell v. Wilhelm*, 36 W. Va. 598.

³ *McDermot v. Barton*, 106 Cal. 194.

⁴ *Hamer v. McKinley, etc., Co.*, 52 Neb. 705; Freeman on Executions, sec. 291.

⁵ Freeman on Executions, sec. 289; *Ared v. Montague*, 26 Tex. 732, 84 Am. Dec. 663; *Holmes v. Taylor*, 48 Ind. 169.

making it, and if such disqualification exists, sales made by him are void, if it appears from the record.¹

An administrator's sale must be made by or under the direction of the administrator. The court cannot appoint some other person to make the sale.² Nor can an executor appoint some person in his stead to exercise a power of sale contained in the will.³ Whether a sale is made by an officer acting under an execution or order of sale, or by an executor, administrator or guardian, under a power conferred by a will, or by an order of court, there is no objection to his employing an auctioneer to conduct the sale, provided it takes place in the presence of the officer and under his direction,⁴ and it is said that it is not indispensable that a guardian be present at the sale of land of his ward, that the guardian may be represented at such sale by his attorney, and at all events, that it cannot, after confirmation, be held void.⁵ An administrator's or commissioner's sale, at which he was not present, but which is conducted by his agent, is voidable, if not void.⁶ It seems to always be essential that the person making a sale in an official capacity be at least an officer *de facto*, and as such authorized to act in the particular case. A sheriff or constable has no authority to act under a writ directed to another sheriff or constable, and a sale made by him is void.⁷ So a sale made by an ex-sheriff, in a case where the sheriff in office ought to have acted,⁸ or by the sheriff in office where the ex-sheriff ought to have

¹ Knight v. Morrison, 79 Ga. 55, 11 Am. St. Rep. 405.

² Crouch v. Eveleth, 12 Mass. 503; Swan v. Wheeler, 4 Day, 137; Jarvis v. Russick, 12 Mo. 63; Rose v. Newman, 26 Tex. 131; State v. Founts, 89 Ind. 313.

³ Pearson v. Jamison, 1 McLean, 197.

⁴ Noland v. Noland, 12 Bush. 426; Blossom v. Milwaukee, etc., R. R. Co., 3 Wall. 196; Williamson v. Berry, 8 How. (U. S.) 495.

⁵ Meyers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627.

⁶ Chambers v. Jones, 72 Ill. 275; Sebastian v. Johnson, 72 Ill. 282.

⁷ Bybee v. Ashby, 2 Gilm. 151, 43 Am. Dec. 47; Gordon v. Camp, 3 Pa. St. 349, 45 Am. Dec. 647.

⁸ Bank of Tenn. v. Beatty, 3 Sneed, 305, 65 Am. Dec. 58.

acted,¹ is without authority of law and void. The division of a county after the levy of an execution does not divest the sheriff levying the writ of power to make the sale.² A sheriff is incompetent to execute a writ to which he is a party. A sale made by him under a judgment in his favor is a nullity.³ The rule pronouncing sales void when conducted by officers having no authority to make them, may operate harshly in some instances, but it is justified on the ground that the officer is known not to be acting for himself, but as an agent, and that it is always the duty of a person, dealing with one who assumes to act as an agent, to ascertain, at his peril, the existence of the latter's authority.

§ 30. **At What Time a Sale May be Made.**—Of course, no judicial or execution sale ought to take place at any other time than that fixed by the notice of sale; and the notice of sale ought not to fix upon any time prohibited by law. A sale made in violation of this rule will, no doubt, be vacated or refused confirmation if the irregularity is suggested to the court at the proper time. It is not, however, void in most States.⁴ A distinction may properly be made between a sale not made on the day specified in the notice, or made at an improper hour of such day, and a sale made on a day on which, under the law, no sale can properly be made. In the latter class of cases, as all persons must take notice of the law, both the original purchaser and all persons deraining title from him are presumed to know that the sale occurred without the authority of law. Such sales have generally been adjudged void,⁵ unless reported to and confirmed by the court.⁶

¹ *Purl v. Duvall*, 5 H. & J. 69, 9 Am. Dec. 490.

² *Lofland v. Ewing*, 5 Litt. 42, 15 Am. Dec. 41.

³ *Collais v. McLeod*, 8 Ired. 221, 49 Am. Dec. 376; *Bowen v. Jones*, 13 Ired. 25.

⁴ *Freeman on Executions*, sec. 287.

⁵ *Mayers v. Carter*, 87 N. C. 146; *State v. Rives*, 5 Ired. 297; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Jeters v. Caton*, 6 Tex. 556; *Tippett v. Mize*, 30 Tex. 365, 94 Am. Dec. 313; *Lowdermilk v. Corpening*, 101 N. C. 649.

⁶ *Brown v. Christie*, 27 Tex. 75, 84 Am. Dec. 607.

In New York, a sale after sunset was held void.¹ This is because a statute of that State fixes the hours between which execution sales may be made, and thereby prohibits them after sunset. In the absence of a statute upon the subject, it is evident that, as the object is to give publicity to execution sales and thereby invite bidding and prevent the sacrifice of property, the officer should select such an hour of the day as will be likely to encourage competition and realize the best price, and the selection of a late hour at night may, in connection with other circumstances, induce the court to declare the sale unfair, and, in extreme instances, void.² In Illinois, a sale at four o'clock in the morning was adjudged to be voidable only, and to be capable of becoming unobjectionable through the defendant's acquiescence.³ This rule certainly ought to be recognized and enforced in all sales made at an improper time.⁴ If an agreement is made to the effect that a sale shall not take place at the time fixed in the notice thereof, but the officer, in ignorance of the agreement, proceeds with the sale, it must be deemed valid in favor of a purchaser without notice.⁵ In Connecticut, a statute provided that execution sales of personal property should be made at the end of twenty-one days after the notice of the sale was posted. A sale one day later was adjudged void on the ground that the statute clearly prohibited a sale at that time, and that the officer's authority had absolutely terminated, and all intending purchasers were chargeable with notice of such termination.⁶ It is always essential that a sale be made under a valid, subsisting authority. A sale made when

¹ *Carnick v. Myers*, 14 Barb. 9.

² *McNaughton v. McLean*, 73 Mich. 250.

³ *Rigney v. Small*, 60 Ill. 146.

⁴ *Jackson v. Spink*, 50 Ill. 404; *Botsford v. O'Conner*, 57 Ill. 72; *Doe v. Woodson*, 1 Hayw. 24.

⁵ *Knox v. Yow*, 91 Ga. 367.

⁶ *Morey v. Hoyt*, 65 Conn. 516.

such authority had been destroyed by lapse of time would everywhere be treated as void. If the statute, under which a license to sell is granted, limits the operation of the license within a designated period, a sale outside of the prescribed limit is a nullity.¹ In some instances licenses to sell have been held to have lost their vitality through lapse of time, although the statute had not directly prescribed any such limit to their power.² If the act under which an order of sale has been granted is repealed, or the court in which it was entered is abolished, its legal vitality is destroyed, and it cannot support a subsequent sale.³ An execution cannot be legally levied after the return day thereof, and if a levy is attempted after such return day and is followed by a sale, both the levy and sale are void.⁴ But by the common law, the levy of an execution creates a special property in the sheriff, and by virtue of such property he may proceed to sell after the return day of the writ, as well as before. This is unquestionably true with respect to personal property. A levy on real estate, however, creates no special property therein, and great contrariety of opinion has developed concerning the power of officers to make sales thereof after the return day of writs on levies made before such time. The weight of the authorities favors the validity of such sales.⁵

¹ *Macy v. Raymond*, 9 Pick. 285; *Marr v. Boothby*, 19 Me. 150; *Mason v. Ham*, 36 Me. 573; *Williamson v. Williamson*, 52 Miss. 725.

² *Wellman v. Lawrence*, 15 Mass. 326. In this case the sale was made fifteen years subsequent to the license.

³ *McLaughlin v. Janney*, 6 Gratt. 609; *Perry v. Clarkson*, 16 Ohio, 571; *Bank v. Dudley*, 2 Pet. 493.

⁴ *Jefferson v. Curry*, 71 Mo. 85; *Logsdon v. Spevey*, 54 Ill. 104.

⁵ *Freeman on Executions*, sec. 106; *Blair v. Compton*, 33 Mich. 414; *Wyant v. Tuthill*, 17 Neb. 495; *Johnson v. Bemis*, 7 Neb. 224; *Kane v. McCown*, 55 Mo. 181; *Phillips v. Dana*, 3 Scam. 551; *Pettingill v. Moss*, 3 Minn. 222, 74 Am. Dec. 747; note to *Young v. Smith*, 76 Am. Dec. 81; *Stein v. Chambliss*, 18 Iowa, 474, 87 Am. Dec. 411; *Childs v. McChesney*, 20 Iowa, 431, 89 Am. Dec. 545; *Rose v. Ingram*, 98 Ind. 276; *Southern C. L. Co. v. Ocean B. H. Co.*, 94 Cal. 217, 28 Am. St. Rep.

Where a writ was levied during the existence of a judgment lien, it was held neither to continue the lien nor to create a new and independent lien. Where these circumstances exist, therefore, it must follow that the sale can derive no support from the levy, and that if the execution is returned and a like writ afterwards issues, and a sale is made thereunder, it must depend wholly on the second writ and the proceedings taken for its enforcement, and must be subordinate to transfers made by, and liens acquired against, the judgment debtor before the levy of the later writ.¹

A sale may be attacked on the ground that it was made when the officer, instead of making it, should have directed an adjournment to another time, or, on the reverse ground, that it was made at the time originally appointed for it, but that the officer either made an unauthorized adjournment or did not give sufficient or any notice of the time to which the adjournment was made. We feel confident that a sale will never be declared absolutely void because the officer failed to adjourn it from the time first appointed, nor, on the other hand, because he did adjourn it from that time to another. Though no one is present except the plaintiff and his attorney, the officer making the sale need not direct an adjournment, and a sale made under such circumstances and when there can be no other bidder than the plaintiff, is not, for that reason, void.² Respecting the notice to be given of an adjourned sale, the decisions are conflicting, some of them maintaining that it is sufficient if the officer publicly announces at the time and place first fixed for the sale that

115; *Bradley v. Sandilands*, 66 Minn. 40, 61 Am. St. Rep. 386. *Contra*: *Sheppard v. Rhea*, 49 Ala. 125; *Paine v. Hoskins*, 3 Lea, 284; *Smith v. Mundy*, 18 Ala. 182, 52 Am. Dec. 221; *Rogers v. Cawood*, 1 Swan, 143, 55 Am. Dec. 739; *Mitchell v. Ireland*, 54 Tex. 301; *Williamson v. Williamson*, 52 Miss. 725.

¹ *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256; *Sanders v. Russell*, 86 Cal. 121, 21 Am. St. Rep. 28; *Rogers v. Druffel*, 46 Cal. 654.

² *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, 61 Am. St. Rep. 154; *Power v. Larabee*, 3 N. D. 502, 44 Am. St. Rep. 154.

it is adjourned to a time and place then named by him, and others that a new notice must be given for the time and in the manner required in the first instance.¹

§ 31. **Sales Made at an Improper Place** are sometimes held to be irregular merely, but more frequently are adjudged void.² If, however, a statute declares that the sale shall be at the door of the court house, or at such other place as the court may direct, and an officer makes a sale at a place other than the court house, and without the previous direction of the court, such sale cannot, after it is confirmed, be held void, because the approval by the court is equivalent to its previous authorization to make the sale at the place selected by the officer.³ Execution sales of real estate must be made in the county where it is situate, and by an officer of such county;⁴ but a commissioner in chancery may be authorized to sell real estate beyond the limits of the county in which he was appointed.⁵ Personal property, capable of being examined and inspected, must, if possible, be at or near the place of sale. Bidders must be permitted to view it, and, by the exercise of their various senses, to judge of its character and value. Any other rule would tend to a wanton sacrifice of the property. Hence, a sale of personal property at a place where it cannot be examined nor seen, is a nullity.⁶

¹ Freeman on Executions, sec. 288.

² Freeman on Executions, sec. 289; *Murphy v. Hill*, 77 Ind. 129; *Paulsen v. Hall*, 39 Kan. 365; *Hall v. Ray*, 40 Vt. 576, 94 Am. Dec. 440; *Moody v. Moeller*, 72 Tex. 635, 13 Am. St. Rep. 839.

³ *Thompson v. Burge*, 60 Kan. 549, 72 Am. St. Rep. 369.

⁴ Freeman on Executions, sec. 289; *Morrell v. Ingle*, 23 Kan. 32; *Menges v. Oyster*, 4 W. & S. 20, 39 Am. Dec. 56; *Thacker v. Devol*, 50 Ind. 30; *Hanby v. Tucker*, 23 Ga. 132, 68 Am. Dec. 514.

⁵ *Bank v. Trapier*, 2 Hill Ch. 25.

Freeman on Executions, sec. 290; *Collins v. Montgomery*, 2 N. & McC. 39; *Kennedy v. Clayton*, 29 Ark. 270. *Contra*, where valid levy has been made, *Eads v. Stephens*, 63 Mo. 90. And in Alabama, an execution sale of goods not present thereat is voidable only. *Foster v. Mabe*, 4 Ala. 402, 37 Am. Dec. 749.

§ 32. **Sales Not at Public Auction.**—Execution sales must be made at public auction. Probate and other judicial sales are generally controlled, in this respect, by the directions contained in the license or decree. Whenever, by law or by direction in an order of sale, property is required to be sold at public auction, a private sale thereof is invalid.¹ There are cases which seem to sustain the view that an execution sale cannot be made unless there are bidders or by-standers present other than the officers conducting the sale and the parties to the suit; and that a sale made to the judgment creditor, when there is no one present but himself and the sheriff, is a nullity.² The decision was placed upon the ground that the presumption of collusion between the purchaser and officer was “irresistible and conclusive.” If there were any circumstances tending to show that no sufficient notice of the sale was given, or that anything was done to prevent intending purchasers from attending the sale, then, in the event of plaintiff’s purchasing, and especially if the purchase was for a decidedly inadequate sum, there might be sufficient reason, in the interest of sound public policy, for presuming a collusion and permitting this presumed collusion to vitiate the sale. But we know of no means by which the plaintiff in execution, or the officer conducting the sale, can compel the attendance either of by-standers or of competing bidders, and are, therefore, unable to concur in the opinion that a sale in their absence is irresistible or conclusive evidence of collusion, or is any adequate ground for pronouncing such sale void,³ though we

¹ *Hutchison v. Cassidy*, 46 Mo. 431; *Ellet v. Paxson*, 2 W. & S. 418; *Fambro v. Gantt*, 12 Ala. 298; *Wier v. Davis*, 4 Ala. 442; *McArthur v. Carrie*, 32 Ala. 275; *Gaines v. De La Croix*, 6 Wall. 719; *Neal v. Patterson*, 40 Ga. 363; *Ashurst v. Ashurst*, 15 Ala. 781; *Worten v. Howard*, 2 S. & M. 527. *Contra*: *Wynns v. Alexander*, 2 D. & B. Eq. 58; *Tynell v. Morris*, 1 D. & B. Eq. 559.

² *Ricketts v. Ungangst*, 15 Pa. St. 90, 53 Am. Dec. 572; *Michael v. McDermott*, 17 Pa. St. 353, 55 Am. Dec. 560.

³ *Gilbert v. Watts-De Golyer Co.*, 169 Ill. 129, 61 Am. St. Rep. 154; *Power v. Larabee*, 3 N. D. 502, 44 Am. St. Rep. 577.

concede that, in the event of a gross inadequacy, in the sum bid, or of any suspicious circumstance whatever, the fact that the sale took place without the presence of bidders or by-standers might well justify a court in setting it aside.

It has been held that the bid must be made at the time of the sale; that if the officer, receiving an offer of a designated sum before the sale, at the sale accepts and cries such offer and makes a sale in pursuance of such offer, that the sale is void.¹ This decision is best justified on the ground that the bid in question, being made and accepted in the absence of the bidder, could only be made through the instrumentality of the officer acting on behalf of the bidder; and that the law does not permit the officer to act as the agent of the purchaser.

§ 33. Sales to Persons Incompetent to Purchase or Disqualified from Purchasing.—We doubt whether any person, natural or artificial, is incompetent to purchase in the sense that an execution or judicial sale to him can properly be characterized as void. It has, we admit, been held in a series of decisions in one State that a county having power to purchase and hold for public use, lands within its own limits, was without power to acquire real property, except for such use, and that its purchase of lands at an execution sale, though under a judgment in its favor, was absolutely void, and a conveyance executed by the proper officer incapable of vesting it with any title.² In our judgment the power of a corporation to purchase property at an execution or judicial sale cannot be inquired into collaterally, and hence its purchase cannot be void. A natural person may not have capacity to contract, as where he or she is subject to the disability of minority or insanity, or, being a woman, is by the law of the State incompetent to contract because of coverture. These disabilities, however, are for the protec-

¹ Sparling v. Todd, 27 Ohio St. 521.

² Williams v. Lash, 8 Minn. 496; Shelley v. Lash, 14 Minn. 498; James v. Wilder, 25 Minn. 305.

tion of the persons subject thereto, and cannot be urged by others for the purpose of avoiding contracts or withholding rights. Therefore, if a person under any of these disabilities should purchase at a judicial or execution sale, pay the purchase price and receive a conveyance, it would vest title in him or her to the same extent as if no disability existed.¹ If one person assumes to be the agent of another, and in that capacity to make a bid for the latter, pay the purchase price, and receive a conveyance, he whose lands are sold cannot question the authority of such agent, and thereby destroy the effect of the sale or conveyance.²

The policy of the law is not to permit the same person to represent conflicting interests. Hence, trustees, sheriffs, constables, administrators, executors, guardians, and all persons vested with authority to sell the property of others, are themselves forbidden from becoming interested in the sale. A sale made in violation of this rule will always be vacated upon a motion made in due time.³ Whether a party to a suit or action is disqualified from purchasing depends upon whether he is, in contemplation of law, in charge of the sale, and hence in effect acting as trustee or agent, or is under obligation to discharge the whole liability for the satisfaction of which the sale is made. By the English chancery practice the conduct of the sale was usually given to the plaintiff, and neither he nor any of the parties to the suit was at liberty to bid, unless leave to do so was granted by the court. Where, however, the conduct of the sale is not in charge of the plaintiff, but is by law or the decree or order of the court committed to some other person, there is no disqualification on the part of the plaintiff to purchase. A purchase by the defendant of his own property, followed by a conveyance to him, can amount to no more than the voluntary payment by him of the obliga-

¹ Freeman on Executions, sec. 292.

² Deans v. Wilcoxon, 25 Fla. 980.

³ Freeman on Executions, sec. 292.

tion which his bid went to discharge. If he is one of two or more defendants, he may purchase the property of either of the others, except when the obligation which is being enforced is one which it is his sole duty to discharge, and even then, except when this duty is disclosed by the record, the purchase is probably not void in the extreme sense, but only subject to be avoided in equity. If an execution is against co-tenants for their joint debt, a purchase of the property of the co-tenancy by one of them must be held by him subject to the duty of reconveying their shares to his co-tenants upon their repaying him their shares of the money necessarily expended in the purchase. Either of several judgment debtors may purchase at an execution sale the property of his co-defendants. By such sale he acquires the title to their property, and they become vested with a cause of action against him to recover his share of the debt. If one of the judgment debtors is, as between himself and another, a surety only, he may purchase the lands of his principal under an execution issued upon the judgment, and his title will be in all respects as valid and as free from other claims and incumbrances as if the purchase had been by one not a party to the action.¹ The only question strictly within the scope of our present inquiry is the effect of a sale to a person disqualified from purchasing when no action is taken, for the purpose of setting it aside. If the sale and conveyance are made directly to the administrator, sheriff or other officer, they may well be declared nullities, on the ground that one person cannot unite in himself the capacity of vendor and vendee—cannot, by the same act, transmit and receive.² So, although the person purchasing, and to whom a conveyance is made does not assume, and is not required to assume, to act both as vendor and vendee,

¹ Freeman on Executions, sec. 292.

² Hamblin v. Warnecke, 31 Tex. 94; Boyd v. Blankman, 29 Cal. 34, Stapp v. Toler, 3 Bibb, 450; Dwight v. Blackmar, 2 Mich. 330, 57 Am. Dec. 130.

yet if his purchase is in violation of an express statutory prohibition, and this fact is apparent from an inspection of the conveyance and proceedings, such conveyance may well be adjudged void.¹ Two or more administrators or executors of the same decedent are, in law, treated as one person. Hence, even where the statute permits such an officer to purchase the property of the estate which he represents, one of them cannot convey to the other.² But usually laws are sought to be evaded rather than openly violated. Hence, an administrator or sheriff, desirous of becoming the owner of property about to be sold by himself, will seek the aid of a friend, in whose name the purchase can be made and the title held, for such time as will conceal the true nature of the transaction. In a case of this kind, the officer cannot be permitted to profit by the transaction at the expense and against the will of the parties interested. On learning the true state of the facts they may have the sale annulled, or they may affirm it and permit it to stand. If they seek to annul it, they are entitled to succeed, irrespective of the fairness or unfairness of the sale, or the motives which prompted the administrator or other officer or trustee.³ But the sale is not void in the extreme sense. It cannot be attacked and overthrown by third persons. Neither can the heirs or other parties in interest treat it as unqualifiedly void. They may confirm it either directly, or by their non-action continued for a long period of time,

¹ *Aronstein v. Irvine*, 49 La. Ann. 1478; *O'Donoghue v. Boies*, 92 Hun, 3.

² *Green v. Holt*, 76 Mo. 677.

³ *Riddle v. Roll*, 24 Ohio St. 572; *Anderson v. Green*, 46 Ga. 361; *Potter v. Smith*, 36 Ind. 231; *Smith v. Drake*, 23 N. J. Eq. 392; *Fronberger v. Lewis*, 70 N. C. 456; *Ryden v. Jones*, 1 Hawks. 497, 9 Am. Dec. 660; *Miles v. Wheeler*, 43 Ill. 123; *Downing v. Lyford*, 57 Vt. 507; *Ives v. Ashley*, 97 Mass. 198; *Bailey v. Robinson*, 1 Gratt. 4, 42 Am. Dec. 540; *Edmunds v. Crenshaw*, 1 McCord's Ch. 252; *Glass v. Great-house*, 20 Ohio, 503; *Guerrero v. Ballerino*, 48 Cal. 118; *Scott v. Freeland*, 7 S. & M. 409, 45 Am. Dec. 310; *Green v. Sargeant*, 23 Vt. 466, 56 Am. Dec. 88.

after having notice of the true nature of the transaction. Such, at least, is the opinion of the majority of the authorities.¹ In some of the cases, however, such a sale appears to have been held void.² In New York, it is made void by statute.³ If an administrator with the will annexed obtains an order of sale and makes sale of lands in accordance therewith, procures its confirmation, and executes a deed to be delivered to the purchaser upon his complying with the terms of the sale, and, before any of the purchase money is paid, takes a deed to himself from the purchaser upon the consideration of the latter's obligation to pay the sum bid, the lands must be regarded as still unadministered upon, and an action may be maintained to compel such administrator to proceed to sell such lands as if no sale had been made.⁴ Sales made by sheriffs and constables, in which they are interested, are, under the statutes in force in many of the States, held void.⁵

¹ *Litchfield v. Cudworth*, 15 Pick. 23; *Munn v. Burges*, 70 Ill. 604; *Boyd v. Blankman*, 29 Cal. 19; *Hicks v. Weens*, 14 La. Ann. 629; *Muselman v. Eshelman*, 10 Pa. St. 394, 51 Am. Dec. 493. See also the authorities in the preceding citation, and *White v. Iselin*, 26 Minn. 487; *Fuller v. Little*, 59 Ga. 338; *Murphy v. Teter*, 56 Ind. 545; *Temples v. Cain*, 60 Miss. 478; *Davidson v. Davidson*, 28 La. Ann. 269; *Flanders v. Flanders*, 23 Ga. 249, 68 Am. Dec. 523; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Bland v. Muncaster*, 24 Miss. 62, 57 Am. Dec. 162; *Burch v. Lantz*, 2 Rawle, 392, 21 Am. Dec. 458; *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17; *Burris v. Kennedy*, 108 Cal. 331; *Rudolph v. Underwood*, 88 Ga. 664; *Houston v. Bryan*, 78 Ga. 181, 6 Am. St. Rep. 252; *Comegys v. Emerick*, 134 Ind. 148, 39 Am. St. Rep. 245; *Otis v. Kennedy*, 107 Mich. 312; *Anderson v. Butler*, 31 S. C. 183; *Melms v. Pabst B. Co.*, 93 Wis. 153, 57 Am. St. Rep. 899.

² *Hamblin v. Warnecke*, 31 Tex. 94; *Morgan v. Wattles*, 69 Ind. 260; *Howell v. Tyler*, 91 N. C. 207; *Scott v. Gordon's Ex.*, 14 La. 115, 33 Am. Dec. 578; *Wipff v. Herder*, 6 Tex. Civ. App. 685.

³ *Terwilliger v. Brown*, 44 N. Y. 237.

⁴ *Caldwell v. Caldwell*, 45 Ohio St. 512.

⁵ *Freeman on Executions*, sec. 292; *Woodbury v. Parker*, 19 Vt. 353, 47 Am. Dec. 695; *Chandler v. Moulton*, 33 Vt. 247; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435. Perhaps, by the concurrence, both of plaintiff and defendant, a constable's sale to himself may be ratified and become valid. *Farnum v. Perry*, 43 Vt. 473.

A sale to an administrator or guardian, where he is not the officer conducting the sale, as where it is made under an execution against his ward or intestate, while perhaps not so objectionable as a sale made in his official capacity, is, nevertheless, treated with no greater indulgence. The title acquired thereat would doubtless be treated as held in trust for the benefit of the ward or heirs, and they could compel a conveyance to them on reimbursing the guardian or administrator for the money necessarily expended in the purchase. The sale by an administrator, executor, or guardian to a member of his own family may be subject to just suspicion, but there is no absolute disqualification on the part of any member of the family from purchasing. Hence, a sale made by two executors to the wife of one of them, where no fraud or collusion is alleged, cannot be avoided on the ground that the husband and wife are, in legal contemplation, one person, and therefore that she cannot become a purchaser at a sale made by her husband, nor on the ground that when she takes title under such purchase he acquires an interest in the property, if, by the laws of the State, the wife has a distinct and individual existence relating to her right to contract for and purchase real estate, and take title in her own name, and hold, use, and enjoy it.¹

In Arkansas, the attorney who prepares the petition for and obtains an order of sale, and the judge who grants such order, are incompetent to become purchasers at the sale.² If the judge is one whose duty it is to determine, upon the report of the sale, whether it shall be confirmed, we cannot question the propriety of disqualifying him from bidding and adjudging a conveyance to him void if based upon his order of confirmation;³ but in the case of execution sales requiring no order of confirmation, the judge who pro-

¹ *Crawford v. Gray*, 131 Ind. 53.

² *West v. Waddell*, 33 Ark. 575; *Livingston v. Cochran*, 33 Ark. 294.

³ *Hoskinson v. Jacquess*, 54 Ill. App. 59.

nounced the judgment, or the justice of the peace who issued the execution, is not incompetent to purchase, and a sale to him is not void.¹ Under ordinary circumstances it is doubtful whether an attorney of a guardian or administrator is, by public policy, forbidden from becoming a purchaser at a sale made by such guardian or administrator.² An attorney having charge of the sale of real estate under execution cannot purchase the land for his own benefit, to the prejudice of his clients, or either of them. He cannot insist upon his purchase unless he paid an amount sufficient to satisfy his client's judgment.³ As the relation of client and attorney is necessarily a confidential one, the latter will not be permitted to maintain an attitude of hostility to the interests of the former, and, hence, if he makes any purchase in his own name, or for his own interest, his client will certainly be permitted to treat the attorney as having acted as his trustee, and hence the attorney is not at liberty to enforce any advantage apparently gained by the purchase. If the attorney for the plaintiff purchases the property at a sum sufficient to satisfy the judgment, this act can by no legal possibility prejudice the plaintiff, and the attorney may hold the purchase for his own benefit. If the attorney for the defendant makes a purchase, there is no doubt that he may enforce it as against all persons except his client, and, hence, in a State where an execution or judicial sale has the effect of cutting off all other incumbrances, this effect cannot be denied to a sale because it was made to an attorney for the judgment debtor.⁴ A sale may be vacated, when, being in partition, it was made to the attorney of all the parties, because it is against public policy to permit him, while having control of the sale and the

¹ *Smith v. Perkins*, 81 Tex. 152, 26 Am. St. Rep. 794.

² *Grayson v. Weddle*, 63 Mo. 523; *Leconte v. Irwin*, 19 S. C. 554.

³ *Jones v. Martin*, 26 Tex. 57; *Leisenring v. Black*, 5 Watts, 303, 30 Am. Dec. 322; *Burke v. Daly*, 14 Mo. App. 542.

⁴ *Saunders v. Gould*, 124 Pa. St. 237.

other proceedings, to assume a position which may induce him to sacrifice the interests of his client.¹ Where a sale is made to an attorney, and is not vacated, we assume that it is incumbent on the client, wishing the advantage of the sale, to elect, within a reasonable time, to bear the burden of the sale, and of discharging it by recompensing the attorney by repaying the amount of the bid and any other necessary expenditures.²

§ 34. **Sales to Raise too Great a Sum.**—In Kentucky, an execution or chancery sale to raise a sum greater than that authorized by the judgment or decree is void.³ A like rule seems to apply to probate sales in a few of the States.⁴ How this rule can with any propriety be enforced against probate or chancery sales we are unable to imagine or understand. These sales take place under the authority of courts exercising jurisdiction over the owners of the property sold, and are reported to and confirmed by such courts, and when so confirmed the parties in interest then properly before the court are concluded by the order of confirmation. This is conceded in Kentucky, with respect to all sales reported and confirmed by the court.⁵ And we think that even in the case of execution sales, which the court is not required to confirm, that the sale of more property than was required to satisfy the judgment is a mere irregularity, for which the sale may be vacated; but that until vacated by some appropriate proceeding it is valid.⁶

¹ *Burke v. Daly*, 14 Mo. App. 542.

² *Baler v. Davenport N. B.*, 77 Iowa, 615.

³ *Patterson v. Carneal*, 3 A. K. Marsh. 618, 13 Am. Dec. 208; *Blakely v. Abert*, 1 Dana, 185; *Hastings v. Johnson*, 1 Nev. 613.

⁴ *Litchfield v. Cudworth*, 15 Pick. 23; *Lockwood v. Sturtevant*, 6 Conn. 373; *Adams v. Morrison*, 4 N. H. 166, 17 Am. Dec. 406; *Wakefield v. Campbell*, 20 Me. 393, 37 Am. Dec. 60.

⁵ *Dawson v. Litsey*, 10 Bush, 408.

⁶ *Groff v. Jones*, 6 Wend. 522, 22 Am. Dec. 545; *Tiernan v. Wilson*, 6 Johns. Ch. 411; *Aldrich v. Wilcox*, 10 R. I. 405; *Osgood v. Blackmore*, 59 Ill. 261; *Weaver v. Guyer*, 59 Ind. 195; *Gibson v. Lyon*, 115 U. S. 439.

§ 35. **Sales of Property Not Subject to Sale.**—It is always indispensable that the property sold be subject to the license, decree or writ under which the sale is made. If it is a writ of execution, a distinction should be kept in mind between property not subject to the writ under any circumstances, and property which, though generally subject, may be under some circumstances exempt. Independently of the exemption laws, certain classes of property are not subject to execution because of the use made of it, or the peculiar interest of the defendant therein, or of some policy declared by the legislature, as, for instance, franchises,¹ public cemeteries,² property owned by the State,³ property dedicated for public uses, as for streets, public squares, hospitals, and the like,⁴ copyhold estates and other tenancies at will,⁵ estates of mortgagees who hold the legal title,⁶ rights to enter for condition broken,⁷ or of a minor to disaffirm a conveyance,⁸ the interests of a dowress before the assignment of dower,⁹ options to purchase real property,¹⁰ the naked legal title, the defendant having no beneficial interest therein,¹¹ the rights of pre-emption claimants

¹ Freeman on Executions, sec. 179.

² Brown v. Lutheran Church, 23 Pa. St. 500; Arbuckle v. Cowtan, 3 Bos. & P. 327.

³ Carter v. State, 42 La. Ann. 927, 21 Am. St. Rep. 404.

⁴ Freeman on Executions, sec. 172; Oakland v. Oakland W. F. Co., 118 Cal. 160; Flora v. Naney, 126 Ill. 45; New Orleans v. Louisiana C. Co., 140 U. S. 654.

⁵ Freeman on Executions, sec. 177.

⁶ Freeman on Executions, sec. 184.

⁷ Edmondson v. Leach, 56 Ga. 461; Bangor v. Warren, 34 Me. 324, 56 Am. Dec. 657.

⁸ Kendall v. Lawrence, 22 Pick. 540.

⁹ Freeman on Executions, sec. 185.

¹⁰ Chadbourne v. Stockton S. & L. Soc. (Cal.), 36 Pac. Rep. 127; Smith v. Dobbins, 87 Ga. 306.

¹¹ Freeman on Executions, sec. 173; Morrison v. Harrington, 120 Mo. 665; Wright v. Franklin Bank, 59 Ohio St. 80; Crenshaw v. Julian, 29 S. C. 283, 4 Am. St. Rep. 719. *Contra*: Smith v. Lookabill, 71 N. C. 25; Giles v. Palmer, 4 Jones, 386, 69 Am. Dec. 756; Colyer v. Capital City Bank, 103 Tenn. 723.

in the lands of the United States,¹ or of persons acquiring homesteads in the lands of the United States when the writ is based upon a debt created before the issuing of the patent.² In cases of the character spoken of, and in all others where the property, strictly speaking, is not subject to execution, it is not necessary for the defendant to make any claim during the course of the proceedings taken for the sale of his property, for, whether he make such claim or not, the sale is absolutely void, and the purchaser may be successfully resisted in any action which he may bring for the purpose of recovering possession or of enforcing any other claim which he may choose to make.³ If the property, though generally subject to execution, is exempt in the particular case in which a writ is levied upon it, a sale thereunder is not necessarily void, for the defendant may either waive or forfeit his right of exemption.⁴ In the absence of such waiver or forfeiture, the sale of exempt property is void, and it may hence be recovered from the purchaser.⁵ This rule is equally applicable to a sale of a homestead under execution,⁶ but it is not ordinarily true that the right of exemption of a homestead, so as to expose

¹ Freeman on Executions, sec. 176; *Rupert v. Jones*, 119 Cal. 111; *McMillion v. Leonard*, 19 Colo. 98.

² Freeman on Executions, secs. 176, 250; *Bernard v. Boller*, 105 Cal. 214; *Faul v. Cooke*, 19 Or. 455, 20 Am. St. Rep. 836; *Wallowa N. B. v. Riley*, 29 Or. 289, 54 Am. St. Rep. 794; *Dean v. Dee*, 5 Wash. 580.

³ Freeman on Executions, sec. 351; *Bates v. Livingston M. Co.*, 130 N. Y. 200; *Harris v. Murray*, 26 N. Y. 574, 86 Am. Dec. 268; *Stone v. Perkins*, 85 Fed. Rep. 616.

⁴ Freeman on Executions, secs. 214, 214a.

⁵ Freeman on Executions, sec. 215; *Williams v. Miller*, 16 Conn. 144; *Phillips v. Taber*, 83 Ga. 565; *Paxton v. Freeman*, 6 J. J. Marsh. 234. 22 Am. Dec. 74; *Johnson v. Babcock*, 8 Allen, 583; *Twinan v. Stuart*, 4 Lans. 263; *Stewart v. Welton*, 32 Mich. 56; *Colville v. Bentley*, 76 Mich. 248, 15 Am. St. Rep. 312; *Hart v. Hyde*, 5 Vt. 328.

⁶ Freeman on Executions, sec. 239; *Watts v. Gallagher*, 97 Cal. 47; *Vick v. Doolittle*, 69 Ill. 102; *Imhoff v. Lipe*, 162 Ill. 282; *Ratliff v. Graves*, 132 Mo. 76; *Fulton v. Roberts*, 113 N. C. 44; *McCracken v. Adler*, 98 N. C. 400, 2 Am. St. Rep. 340.

it to a valid execution sale, can be waived or forfeited, unless in some mode designated by statute. If a homestead has been the subject of a judicial sale, then inquiry must be made to determine whether all the parties entitled to claim the homestead were before the court, so that its judgment is conclusive against them. When they are made parties to a suit, they must, of course, assert their rights therein. They cannot remain silent, suffer judgment, and subsequently avoid its effect. Thus, if suit is brought to subject lands to a judgment or other demand, or to enforce some lien thereon, in which event, the homestead claim, if asserted, must prevent any recovery on the part of the complainants, the defendants must in some appropriate manner present their claim to the consideration of the court, and cannot, after judgment is entered against them directing the sale of their homestead, permit such judgment to remain in force and avoid its effect in some collateral proceeding.¹ The property claimed as a homestead may be in excess of the quantity which the claimant is entitled to hold. In such cases, the statute generally provides some mode by which the non-exempt part may be severed from the exempt part and subjected to the satisfaction of the writ. A sale in the absence of such severance is void *in toto*.² From this view there is some dissent on the part of courts which claim that the sale may be construed as having for its subject that part of, or interest in, the land which is in excess of the homestead, and that in such a case commissioners may be appointed after the sale to admeasure

¹ Snapp v. Snapp, 87 Ky. 554; Hill v. Lancaster, 88 Ky. 338; Brownell v. Stoddard, 42 Neb. 177; Traders' N. B. v. Schorr, 20 Wash. 1, 72 Am. St. Rep. 17.

² Owens v. Hart, 52 Iowa, 620; Mebane v. Layton, 89 N. C. 396; Kipp v. Bullard, 30 Minn. 84; Mohan v. Smith, 30 Minn. 259; Hartwell v. McDonald, 69 Ill. 293; Visek v. Doolittle, 69 Iowa, 620; Riggs v. Sterling, 60 Mich. 643, 1 Am. St. Rep. 554; Fogg v. Fogg, 40 N. H. 282, 77 Am. Dec. 415; McCracken v. Adler, 98 N. C. 400, 2 Am. St. Rep. 340; Philbrick v. Andrews, 8 Wash. 7; Freeman on Executions, sec. 239.

the homestead and set aside to the claimant and the purchaser respectively the amounts thereof to which they are entitled, or that, without such admeasurement, the sale may be regarded as creating between them the relation of tenants in common.¹ If, under the statute of a State, the homestead of a decedent does not come within the control of its probate courts, an administrator's sale thereof, though ordered and confirmed by the court, is an idle proceeding.² Of this there can be no question, but the difficulty is in determining whether and when the homestead of the decedent comes within the jurisdiction of that court. If it is the duty of the court to act respecting it, as to set it aside to the widow or for the minor children, or to consider whether it is subject to sale for the payment of debts of a certain class, or to determine whether a homestead in fact existed prior to the decedent's death, whatever decision the court expressly or impliedly makes in the exercise of its jurisdiction, must, upon principle, have the force of *res judicata* against all the parties to the probate proceeding, and hence its decision that a sale shall be made, followed by such sale and its confirmation, may have the effect to divest the title of the homestead claimants.³ If, while acting under a valid decree or license, an administrator sells lands not embraced therein, his act is, as to such lands, obviously without any legal support.⁴

¹ *Swan v. Stephens*, 99 Mass. 7; *Silloway v. Brown*, 12 Allen, 32; *Crisp v. Crisp*, 86 Mo. 630; *Bunn v. Lindsay*, 95 Mo. 250, 6 Am. St. Rep. 49; *Letchford v. Cary*, 52 Miss. 791; *Cross v. Weare*, 62 N. H. 125; *Bradford v. Buchanan*, 39 S. C. 23; *Flatt v. Stalder*, 16 Lea, 371.

² *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162; see *ante*, sec. 9a; *Yarboro v. Brewster*, 38 Tex. 397; *Hamblin v. Warnecke*, 31 Tex. 93; *Howe v. McGivern*, 25 Wis. 525. This is true, though the sale is authorized to be made, and purports to be made subject to the homestead right. *Wehrle v. Wehrle*, 39 Ohio St. 365.

³ See *ante*, sec. 9a; *Ions v. Harbison*, 112 Cal. 260; *Sigmond v. Beber*, 104 Iowa, 431.

⁴ *Ludlow v. Park*, 4 Ohio, 5; *Green v. Holt*, 76 Mo. 677; *Kingsbury v. Love*, 95 Ga. 543; *Bell v. Shaffer*, 154 Ind. 413.

§ 36. **Sales of a Different or Less Interest** than that of which the judgment debtor, or the estate of the decedent was seized, have, in several instances, been adjudged to be void. Thus, a sale which purported to be subject to a mortgage, when the mortgage had previously been fully satisfied, was adjudged to be wholly inoperative. "As to the tract which was levied on and sold, subject to the mortgage, we are of the opinion that nothing but the equity of redemption can be considered as having been sold; and that if the mortgage had previously been paid off, so that there was no subsisting mortgage and no equity of redemption, nothing passed by the sale and sheriff's deed."¹ So, an administrator's sale, under an order "to sell the equitable interest of the estate, when the decedent held a complete title, legal as well as equitable, was held to pass nothing to the purchaser;"² and a like conclusion was reached when an undivided interest was ordered to be sold, when the decedent was seized of an estate in severalty.³ Most of the decisions on this subject are not very clear in their statements of the reasons which were thought sufficient to justify their existence. The only substantial ground for their justification is that neither the officers charged with the seizure and sale of property, nor the courts invested with jurisdiction over the estates of minors or decedents, were intended to be given power to carve a complete and perfect title into distinct estates or interests, thereby

¹ *Dougherty v. Linthicum*, 8 Dana, 198; *Bullard v. Hinkley*, 6 Greenl. 289, 20 Am. Dec. 304. In *Gray v. Ward* (Tenn. Ch. App.), 52 S. W. Rep. 1028, it was held where an execution against L. and J. was levied upon a tract of land devised to L. for life, with remainder to her children, and neither the levy nor the order of sale showed what her interest was, and the land was sold as if it belonged wholly to her, that the levy and sale were void. The question was not, however, discussed by the court, and we do not understand upon what reason, if any, its decision was founded.

² *Crane v. Guthrie*, 48 Iowa, 542; *Braley v. Simonds*, 61 N. H. 369.

³ *Eberstein v. Oswalt*, 47 Mich. 254.

making the subject-matter of the sale less inviting to purchasers, and, probably, leading to a needless sacrifice.

§ 37. **A Sale of an Undesignated** or unlocated part, as of a certain number of acres out of a larger parcel, when voluntarily made, is sustained, and the grantee is allowed to locate his purchase and, until such location, is treated as a tenant in common with his grantor; but like indulgence is not conceded to the purchaser at an execution sale under like circumstances. On the contrary, his purchase is adjudged to be void for uncertainty.¹

§ 38. **Sales of Property in Adverse Possession.**—The policy of the common law prohibited the transfer of causes of action. Lands of which the owner was disseized could not be conveyed during such disseizin. The conveyance of such lands was, by statute (32 Henry 8, c. 9), a crime for which, on conviction, both vendor and vendee were subject to the forfeiture of the value of the lands sought to be conveyed. Execution and judicial sales have never been within this inhibition against voluntary transfers. On the contrary, they are supported, whether he whose title is involuntarily transferred is seized or disseized.²

§ 39. **Sales en Masse.**—The duty of an officer in making a sale is to offer the property in such parcels as will prove most inviting to the bidders, and realize the greatest sums for the heirs and other interested persons. Hence, if several parcels of real estate are embraced in one license, the

¹ *Pemberton v. McRae*, 75 N. C. 497; *Wooters v. Arledge*, 54 Tex. 395; *Freeman on Executions*, sec. 281.

² *Drinkwater v. Drinkwater*, 4 Mass. 354; *Willard v. Nason*, 5 Mass. 241; *High v. Nelms*, 14 Ala. 350, 48 Am. Dec. 103; *Cook v. Travis*, 20 N. Y. 400; *McGill v. Doe*, 9 Ind. 306; *Stevens v. Hauser*, 39 N. Y. 302; *Preston v. Breckinridge*, 86 Ky. 619; *Woodman v. Bodfish*, 25 Me. 317; *State v. Judge*, 48 La. Ann. 667; *Jackson v. Varick*, 7 Cow. 238; *Jarrett v. Tomlinson*, 3 Watts & S. 114; *Kelley v. Morgan*, 3 Yerg. 441; *Freeman on Executions*, secs. 174, 373. *Contra*: *Campbell v. P. S. I. Works*, 12 R. I. 452.

administrator is to offer them for sale, not in one lump, but "in such parcels as shall be best calculated to secure the greatest aggregate amount."¹ Where several distinct parcels of land are to be sold, each ought to be offered and sold separately, unless it is clear that the union of two or more will augment rather than decrease the aggregate proceeds of the sale. In Tennessee, a lumping execution sale of two or more separate parcels of land is void;² but in nearly, if not quite all, the other States, such a sale, though voidable, is not a nullity.³ If one of the parcels sold is not subject to sale, an essentially different question is presented. The sale cannot, of course, be sustained as to it, and to sustain it as to the other parcel must substantially deprive the defendant of his right of redemption, because he cannot exercise it without paying the amount bid for both parcels. Hence, the sale has been declared void as to both.⁴ In Michigan, a probate sale is not void, because two or more parcels are sold together.⁵

§ 40. Sales Infected by Fraudulent Combinations and Devices.—Judicial and execution sales are usually imperative. Those who own property are compelled to sell for

¹ *Delaplaine v. Lawrence*, 3 N. Y. 304.

² *Freeman on Executions*, sec. 296; *Mays v. Wherry*, 58 Tenn. 133; *Brien v. Robinson*, 102 Tenn. 157.

³ *Freeman on Executions*, sec. 296; *Bouldin v. Ewart*, 63 Mo. 330; *Foley v. Kane*, 53 Iowa, 64; *Smith v. Schultz*, 68 N. Y. 41; *Lamberton v. Merchants' Bank*, 24 Minn. 281; *Rector v. Hartt*, 8 Mo. 448, 41 Am. Dec. 650; *Wilson v. Twitty*, 3 Hawks. 44, 14 Am. Dec. 569; *Hudepohl v. Liberty Hall W. Co.*, 94 Cal. 592, 28 Am. St. Rep. 149; *Palmer v. Riddle*, 180 Ill. 461; *Hoffman v. Buschman*, 95 Mich. 538; *Lewis v. Whitten*, 112 Ala. 318; *Power v. Larrabee*, 3 N. D. 502, 44 Am. St. Rep. 577. Indiana and Pennsylvania, though inclined to proceed with caution, will doubtless, when necessity for further action arises, "fall into line" with the majority of their sister States. *Jones v. Kohomo R. Association*, 77 Ind. 340; *Smith v. Meldren*, 107 Pa. 348; *Nelson v. Bronnenberg*, 81 Ind. 102; *Furbish v. Greene*, 108 Pa. St. 503.

⁴ *Mohan v. Smith*, 30 Minn. 259.

⁵ *Osman v. Traphagen*, 23 Mich. 80.

whatever is offered. To avoid the sacrifice likely to ensue, notices of sale are required to be given, the property is struck off to the highest bidder, and competition among the persons intending to bid is sought to be produced. But the bidders, on their part, may enter into combinations and devices, either with one another or the officer conducting the sale, by means of which competition is lessened or altogether avoided. Every scheme looking to this result is highly immoral, and will, if possible, be thwarted by the courts. The sale may be vacated, either by motion or by a bill in equity. "Whether a purchase, obtained by the prevention of competition, can, by the guilty party be asserted at law, is a question upon which the courts are by no means agreed. In several of the States such a purchase, and the deed made in pursuance thereof, are regarded as a valid transfer of the legal title. The defendant in execution, wishing to prevent the assertion of this title, must claim the assistance of a court of equity. But the majority of the decisions sustain an adverse theory—one under which the title of the fraudulent purchaser is, while in his hands, regarded as void, and, therefore, as capable of being resisted not less successfully at law than in equity."¹

§41. **Purchaser's Title Not Affected by Secret Frauds.**—It is a general rule that one who purchases at a judicial, probate or execution sale cannot be deprived of his title by secret frauds or irregularities, in which he did not participate and of which he had no notice.² Hence, an administrator's sale cannot be avoided by showing that he pro-

¹ Freeman on Executions, secs. 297, 342; Underwood v. McVeigh, 23 Gratt. 409; Burton v. Spiers, 92 N. C. 503; Cram v. Rotherinel, 98 Pa. St. 300; Barton v. Hunter, 101 Pa. St. 406; Coble v. O'Connor, 43 Neb. 49; Phelps v. Benson, 161 Pa. St. 418.

² Freeman on Executions, secs. 342, 343; Wisdom v. Parker, 31 La. Ann. 52; Harriman's Heirs v. Janney, 31 La. Ann. 276; Duckworth v. Vaughan, 27 La. Ann. 599; Ziegler v. Shomo, 78 Pa. St. 357; Maina v. Elliott, 51 Cal. 8; Wallace v. Loomis, 97 U. S. 146; Spinks v. Glenn, 67 Ga. 744; Stuart v. Reed, 91 Pa. St. 287; Melms v. Pabst B. Co., 93 Wis. 153, 57 Am. St. Rep. 899.

cured his license to sell by fraud and misrepresentation in the absence of any necessity, and with the design of sacrificing the interests intrusted to his care.¹ Nor can an innocent purchaser be injuriously affected by proof of any mistake, error or fraud of an administrator or guardian in conducting a sale.² Although the original purchaser has himself been guilty of fraudulent devices, or has had notice of such devices practiced by others, he can transmit a valid, unimpeachable title to a vendee for value, in good faith, and without notice. Therefore, if a sale is nominally made to a stranger, but really for the benefit of the administrator, and this stranger conveys to another, for value, who has no notice that the apparent are not the true facts, the title cannot, in the hands of the latter or his vendees, be rendered void or voidable by proof of the real facts.³ The fact that the purchaser did not pay the amount of his bid until several months after the sale, while it [may, as between the purchaser and the defendant, entitle the latter to have the period allowed for redemption computed from the day of such payment rather than from the day of sale, cannot prejudice the title of an innocent purchaser who bought in good faith, relying on the sheriff's deed.⁴ A purchaser at a guardian's or administrator's sale is not charged with the duty of seeing to the proper application of the proceeds of the sale.⁵ The validity of his title is not destroyed by the embezzlement of the money which he has paid to the person

¹ *Lamothe v. Lippott*, 40 Mo. 142; *Meyer v. McDougal*, 47 Ill. 278; *Moore v. Neil*, 39 Ill. 256; *McCown v. Foster*, 33 Tex. 241.

² *Gwinn v. Williams*, 30 Ind. 374; *Staples v. Staples*, 24 Gratt. 225; *Jones v. Clark*, 25 Gratt. 632; *Patterson v. Lemon*, 50 Ga. 231.

³ *Blood v. Hayman*, 13 Met. 231; *Staples v. Staples*, 23 Gratt. 225; *Robbins v. Bates*, 4 Cush. 104; *Gwinn v. Williams*, 30 Ind. 374; *Melms v. Pabst B. Co.*, 93 Wis. 153, 51 Am. St. Rep. 899.

⁴ *Maina v. Elliott*, 51 Cal. 8. But there are cases holding that the fact of non-payment of the purchase money makes void a probate sale. *Corbett v. Clenny*, 52 Ala. 480; *Wallace v. Nichols*, 56 Ala. 321.

⁵ *Grimes v. Taft*, 98 N. C. 193; *Cooper v. Horner*, 62 Tex. 356; *Knotts v. Stears*, 91 U. S. 638; *Barnes v. Trenton Gas L. Co.*, 27 N. J. Eq. 33; *Whitman v. Fisher*, 74 Ill. 147.

authorized by law to receive it.¹ The title of the purchaser at an execution sale is generally not dependent on the officer's return, and a failure to make such return does not avoid it,² neither is it imperiled by defects and variances in such return when made.³

§ 41a. **Purchaser's Title—Secret Equities and Transfers.**—The general rule is, that the title of a purchaser at an execution or judicial sale can be no greater or better than that of the defendant in the writ. If the property of a stranger to the writ or suit is sold, the sale cannot affect his title, though such property was seized under the writ, was in possession of the officer when the sale was made, and was by him delivered to the purchaser.⁴ A conveyance executed pursuant to the sale is equivalent in effect to a deed of quitclaim by the defendant at the time of the sale, where it is not supported by any antecedent lien, otherwise at the date of the attachment of such lien.⁵ One result of this is, that if the defendant subsequently to the sale acquires title, it does not vest in the purchaser unless it would have so vested had the defendant in person made the conveyance by quitclaim.⁶ Sometimes the purchaser acquires

¹ *Giles v. Pratt*, 1 Hill (S. C.), 239, 26 Am. Dec. 170; *Mulford v. Stalzenback*, 46 Ill. 303; *Muskingum Bank v. Carpenter*, 7 Ohio, pt. 1, p. 21, 28 Am. Dec. 616.

² *Bray v. Marshall*, 75 Mo. 327; *Holman v. Gill*, 107 Ill. 467; *Caldwell v. Blake*, 69 Me. 458; *Freeman on Executions*, sec. 341. *Contra*: *Walsh v. Anderson*, 135 Mass. 65.

³ *Freeman on Executions*, sec. 341; *Hebbert v. Smith*, 3 W. C. Rep. 446; *Millis v. Lombard*, 32 Minn. 544; *Ritter v. Scammell*, 11 Cal. 238, 70 Am. Dec. 775; *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404.

⁴ *Freeman on Executions*, sec. 335; *Pekin M. Co. v. Kennedy*, 81 Cal. 358; *Haberling v. Jagger*, 47 Minn. 70, 28 Am. St. Rep. 331; *Andrews v. Key*, 77 Tex. 35; *United L. T. Co. v. Boston S., etc., Co.*, 147 U. S. 431.

⁵ *Cotton v. Carlisle*, 85 Ala. 175, 7 Am. St. Rep. 29; *Thain v. Rudisill*, 126 Ind. 276; *Hentig v. Pipher*, 58 Kan. 788; *Horne v. Nugent*, 74 Miss. 102; *Butler v. Fitzgerald*, 43 Neb. 192, 37 Am. St. Rep. 741; *Miller v. Baker*, 160 Pa. St. 172; *Washburn v. Green*, 133 U. S. 30.

⁶ *Kenyon v. Quinn*, 41 Cal. 325; *McArthur v. Oliver*, 60 Mich. 606; *Westheimer v. Reed*, 15 Neb. 662; *Gentry v. Callahan*, 89 N. C. 448; *Bates v. Bacon*, 66 Tex. 348.

the title of the plaintiff as well as that of the defendant, as when the sale is made to enforce a vendor's lien,¹ or under a decree foreclosing a mortgage.² In some cases a purchaser at an execution or judicial sale acquires a greater or better title than the defendant had. The purchaser's title is not subject to secret equities of which he had no notice, actual or constructive, though they are such as might be enforced against the defendant but for the sale.³ A purchaser is entitled to the benefit of the laws requiring the recording of conveyances and incumbrances affecting the title to real property. Hence, his title cannot be destroyed or impaired by proving the existence of such conveyances or incumbrances made by the defendant prior to the sale, if they were not then of record, and the purchaser had no notice thereof.⁴ If it is the plaintiff who purchases, making no other payment than such as is implied in the satisfaction of his judgment, there is doubt whether he is entitled to protection against unrecorded conveyances or incumbrances, the weight of the authority inclining slightly to the view that he is not.⁵

¹ Freeman on Executions, sec. 385; *Fallon v. Worthington*, 13 Colo. 559, 16 Am. St. Rep. 231.

² *Lanier v. McIntosh*, 117 Mo. 508, 38 Am. St. Rep. 676; *Mount v. Manhattan Co.*, 43 N. J. Eq. 35; *Townshend v. Thompson*, 139 N. Y. 152; *Givens v. Carroll*, 40 S. C. 13, 42 Am. St. Rep. 889.

³ Freeman on Executions, sec. 336; *Hudepohl v. Liberty Hill W. Co.*, 92 Cal. 588, 28 Am. St. Rep. 149; *White v. Leeds I. Co.*, 72 Minn. 352, 71 Am. St. Rep. 488; *Ryan v. Staples*, 78 Fed. Rep. 563.

⁴ Freeman on Judgments, secs. 366, 366a; Freeman on Executions, sec. 336; *De Lany v. Knapp*, 111 Cal. 165, 52 Am. St. Rep. 160; *Duff v. Randall*, 116 Cal. 226, 58 Am. St. Rep. 158; *Lusk v. Reel*, 36 Fla. 418, 51 Am. St. Rep. 32; *Maroney v. Boyle*, 141 N. Y. 462, 38 Am. St. Rep. 821; *Barnett v. Squyres*, 93 Tex. 193, 77 Am. St. Rep. 854.

⁵ Freeman on Executions, sec. 336; *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381; *Barnett v. Vincent*, 69 Tex. 685, 5 Am. St. Rep. 98; *Evans v. Welbourne*, 74 Tex. 530, 15 Am. St. Rep. 858; *Hacker v. White*, 22 Wash. 415, 79 Am. St. Rep. 945. *Contra*: *Riley v. Martinetti*, 97 Cal. 575, 33 Am. St. Rep. 209; *Lusk v. Reel*, 36 Fla. 418, 51 Am. St. Rep. 32.

CHAPTER IV.

PROCEEDINGS AFTER THE SALE.

- 41*b*. Complying with the Statute of Frauds.
- 41*c*. The Officer's Return or Certificate of Sale.
- 41*d*. The Report Where the Sale Must be Confirmed.
- 42. Notice of the Application for Confirmation.
- 43. Confirmation is Essential to Title.
- 44. The Effect of the Confirmation.
- 45. Deed is Essential to Transfer of Legal Title.
- 46. Deed, When and by Whom, May be Made.
- 47. Deed When Void, Because not in Proper Form.

§ 41*o*. **Complying with the Statute of Frauds.**—The only proceeding after the acceptance of the purchaser's bid of which we can think which is absolutely indispensable to the consummation of a valid sale, is the making of a memorandum sufficient to satisfy the statute of frauds, where the sale is one which, if voluntary, would fall within the provisions of that statute. The officer has authority to make this memorandum, and it does not seem to be material when or how he makes it; and this has led to the contention that neither judicial nor execution sales are within that statute. We believe the contention to be unfounded, but it is doubtless true that any writing of the officer, made in his official capacity, whether in his sales book, in his return to the writ, in the certificate of purchase, or even in the deed, may serve the purpose of a memorandum and be

deemed a sufficient compliance with the statute.¹ Delivery of possession to the purchaser is not indispensable. These sales are not within the general rule making sales fraudulent and void as against creditors unless followed by an immediate and continuous change of possession. Hence, there is no ground for contending that a judicial or execution sale is void because the purchaser did not at, or subsequently to, the sale, receive or hold possession of the property purchased.² Payment of the bid is not indispensable to a valid sale. It is true that, until such payment, the purchaser has no right which he can enforce other than the right of compelling acceptance of such payment if tendered.³ It has been held that a conveyance executed by the proper officer without exacting payment of the bid is void.⁴ Such we cannot believe to be the law. It would be dangerous to introduce in the law of execution or judicial sales a rule that a return or conveyance showing payment of the bid may be collaterally impeached, and the title of the purchaser or his successor in interest thereby destroyed. If the rule is to be accepted at all, it should be with the limitation that it can be applied only against the original purchaser and such of his successors as are not entitled to protection as *bona fide* purchasers.⁵

§ 41c. **The Officer's Return or Certificate of Sale.**—Sheriffs and constables are required by law to return writs to the court issuing them, with indorsements showing the proceedings taken thereunder. Such return or indorse-

¹ Freeman on Executions, sec. 299; Linn B. T. Co. v. Terrill, 13 Bush, 463; Stearns v. Edson, 63 Vt. 269, 25 Am. St. Rep. 758.

² Freeman on Executions, sec. 151; Matteucci v. Whelan, 123 Cal. 312, 69 Am. St. Rep. 70; Huebler v. Smith, 62 Conn. 183, 36 Am. St. Rep. 337.

³ Freeman on Executions, sec. 301.

⁴ Chapman v. Harwood, 8 Blackf. 82, 44 Am. Dec. 736; Ruckle v. Barbour, 48 Ind. 274; McCormick v. The W. A. Wood M. & R. M. Co., 72 Ind. 518.

⁵ Freeman on Executions, sec. 301.

ment may constitute sufficient evidence of the sale, but the sale cannot be deemed void because of anything which the return states or omits. The purchaser is not bound by it and may prove without, or even in opposition to it the facts essential to a valid sale.¹ Where the sale is of personal property, the officer selling is often by statute required to deliver to the purchaser a bill of sale. We regard this merely as evidence of the sale and not as essential to its consummation or to the vesting of title in the purchaser. If the property sold is real estate or some interest therein, and the title is not to vest in the purchaser until after the expiration of some time allowed by law within which the defendant is entitled to redeem, the officer may be required to execute and file for record a certificate of purchase showing the judgment under which he acted, the property sold, the amount paid therefor, the name of the purchaser, and the time within which redemption may be made. The omission to comply with the statute does not make the sale void, but there may be exceptional circumstances in which the failure to file the certificate for record may entitle a *bona fide* purchaser to protection against title derived under it.²

§ 41*d*. **The Report Where the Sale Must be Confirmed.**—Where a sale is subject to the approval of some court, it must, of course, be in some manner made known to that court, and the statutes relating to judicial sales, more especially those made by guardians, executors, and administrators, usually require a report of the proceedings, disclosing generally what notice was given of the intended sale, what property was sold, the name of the purchaser, and such other facts as may assist the court in determining whether the sale was fairly and lawfully made and ought to

¹ Freeman on Executions, sec. 341; Willamette R. E. Co. v. Hendrix, 28 Or. 485, 52 Am. St. Rep. 800; *ante*, sec. 41.

² Freeman on Executions, sec. 312; Bowers v. Arnoux, 30 N. Y. Sup. Ct. Rep. 530; Phillips v. Hyland, 102 Wis. 253.

be approved. We need not here enter into any consideration of these statutory regulations. They are usually, if not universally, treated as directory merely. Hence, no defect in the report of the sale, as by failing to verify it, or the making of it by an agent when the principal alone could act, or the omission therefrom of some matter which ought to be stated, can be held sufficient to avoid it after its confirmation,¹ unless it be that it was filed by one who had been an administrator or executor after he had been discharged from the duties of his trust and could no longer represent the estate. While to us it does not seem that even this would deprive the court of jurisdiction to act, yet in at least one State the contrary has been held, and the confirmation and sale adjudged void.²

§ 42. **Notice of the Application for Confirmation.**—By whatever mode the making of the sale may be made known to the court the statute may require some notice to be given before the court proceeds to determine what action it will take. This may be regarded as an independent, adversary proceeding which is to result in a judgment or order depriving the persons affected by the sale of title to their property and the notice as in the nature of a citation to bring them into court. If so, as in cases of other required citations or summonses, the jurisdiction of the court depends upon their service in substantially the mode required by law. A statute may authorize the confirmation of a sale without notice to the heirs or other persons interested,³ but when such notice is required we understand it to be jurisdictional, and hence if admissible evidence shows that it was not given, the sale must be ad-

¹ *Spragins v. Tayler*, 48 Ala. 520; *Denis v. Winter*, 63 Cal. 18; *Higgins v. Reed*, 48 Kan. 272; *Coon v. Fry*, 6 Mich. 506; *Brown v. Hobbs*, 19 Tex. 167; *Harris v. Shafer* (Tex. Civ. App.), 21 S. W. Rep. 110.

² *Garner v. Tucker*, 61 Mo. 427; *Melton v. Fitch*, 125 Mo. 281.

³ *May v. Marks*, 74 Ala. 249; *Moore v. Cottingham*, 113 Ala. 148, 59 Am. St. Rep. 100.

judged void, notwithstanding its confirmation, for such confirmation is but a void judgment.¹

§ 43. **Confirmation is Essential to Title.**—When the law under which a sale is made requires it to be reported to court for approval or disapproval, such approval is essential to the confirmation of the sale. Without it there is no authority for making any conveyance to the purchaser,² and a conveyance without authority is obviously void.³ This rule is equally applicable to execution, chancery and probate sales.⁴ But instances may occur in which the ratification or acquiescence of the parties may either estop them from invoking this rule or give rise to the presumption that an order of confirmation was made, of which the evidence has been lost.⁵ So, the approval of the court has

¹ *Bolling v. Smith*, 108 Ala. 411; *Bogart v. Bell*, 112 Ala. 412; *Dugger v. Tayloe*, 60 Ala. 504; *Perkins v. Gridley*, 50 Cal. 97; *Hawkins v. Hawkins*, 28 Ind. 66; *Speet v. Wohlein*, 22 Mo. 310; perhaps, *contra*, *McGlawhorn v. Worthington*, 98 N. C. 199.

² *Freeman on Executions*, sec. 304a; *Reed v. Radigan*, 42 Ohio St. 292; *McBain v. McBain*, 15 Ohio St. 337; *Curtis v. Norton*, 1 Ohio, 137; *Horton v. Jack*, 115 Cal. 29; *Apel v. Kelsey*, 47 Ark. 413; *Maynard v. Coeke* (Miss.), 18 South. Rep. 374; *Knox v. Spratt*, 19 Fla. 834; *Miller v. Freezor*, 82 N. C. 194; *Greenough v. Small*, 137 Pa. St. 132, 21 Am. St. Rep. 859.

³ *Williamson v. Berry*, 8 How. (U. S.) 496; *Gowan v. Jones*, 10 S. & M. 164; *Dickerson v. Talbot*, 14 B. Mon. 60; *Kable v. Mitchell*, 9 W. Va. 492; *Jones v. Hollingsworth*, 10 Heisk. 652; *Battell v. Toney*, 65 N. Y. 299.

⁴ *Lumpkins v. Johnson*, 61 Ark. 80; *Greer v. Anderson*, 62 Ark. 213; *Hicks v. Blakeman*, 74 Miss. 459; *Bone v. Tyrrell*, 113 Mo. 175; *Burden v. Taylor*, 124 Mo. 12; *Harrison v. Ligner*, 74 Tex. 86; *Mason v. Osgood*, 64 N. C. 467; *Rawlins v. Bailey*, 15 Ill. 178; *Valle v. Fleming*, 19 Mo. 454; *Wallace v. Hall*, 19 Ala. 367; *Rea v. McEachron*, 13 Wend. 465, 28 Am. Dec. 476; *Bonner v. Greenlee*, 6 Ala. 411; *Wade v. Carpenter*, 4 Iowa, 361; *State v. Towl*, 48 Mo. 148.

⁵ *Henderson v. Herrod*, 23 Miss. 434; *Tipton v. Powel*, 2 Coldw. 19; *Smith v. West*, 64 Ala. 34; *Watts v. Scott*, 3 Watts, 79; *Gowan v. Jones*, 10 S. & M. 164; *Moore v. Greene*, 19 How. (U. S.) 69. In some cases the confirmation of probate sales is not required by statute. *Hobson v. Ewan*, 62 Ill. 146; *Robert v. Casey*, 25 Mo. 584. In Missouri, the

sometimes been inferred from its subsequent acts and proceedings, though no order of confirmation could be found in its record.¹ The failure of the clerk of the court to enter the decree of confirmation on the minutes of the court is not fatal to the purchaser's title, where it sufficiently appears that such decree was in fact ordered by the court.² In the absence of any statute to the contrary, it is not material in what form the approval of the sale is expressed. The whole record of the court will be examined, and if from anything therein it is apparent that a sale was approved, this is sufficient. Hence, the confirmation of a sale is inferable from an entry approving the accounts of an executor or administrator, if therein he has charged himself with the proceeds of the sale.³ Surely it is the better practice to have a formal order of confirmation entered and to set forth therein the acts done by the officer, so that an inspection of the order will of itself show that the court has found the giving of the proper notice and the doing of such other acts as were essential to the sale, and further, what were the terms of the sale, the price realized, the property sold, and the person to whom the sale was made; but, unless some statute so directs, it is not necessary that all or any of these facts appear by the order of confirmation itself, for the order of sale, the report of the executor or administrator, and all of the papers on file, as well as the minutes of the court, may be examined, and if, when taken in connection with the sale and the order of approval, these facts sufficiently appear, the sale cannot be held invalid for want of proper confirmation.⁴ Sometimes, as in California,

sale of lands under an order of the probate court must be confirmed; but confirmation is not indispensable to sales in proceedings before the circuit court. *State v. Towl*, 48 Mo. 148; *Castleman v. Relfe*, 50 Mo. 583.

¹ *Grayson v. Weddle*, 63 Mo. 523; *Robertson v. Johnson*, 57 Tex. 62.

² *Moody v. Butler*, 63 Tex. 210.

³ *Pendleton v. Shaw*, 18 Tex. Civ. App. 439.

⁴ *Bunton v. Root*, 66 Minn. 454; *Carey v. West*, 139 Mo. 146; *Camden*

the statute itself makes some provision respecting the contents of the order of confirmation. Thus, the Code of Civil Procedure of that State declares that before any order is entered confirming a sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made. What the effect of non-compliance with this mandate is no court has, so far as we know, been required to consider. We believe, however, it may be safely assumed not to avoid the sale, though perhaps it may cast upon the claimant thereunder the burden of proving the giving of the notice of the sale.

§ 44. **The Effect of the Confirmation.**—In Kansas, the confirmation by the court of an execution sale “is an adjudication merely that the proceedings of the officer, as they appear of record, are regular, and a direction to the sheriff to complete the sale.”¹ With respect to chancery and probate sales, we apprehend that their confirmation has an effect beyond that conceded in Kansas to the confirmation of execution sales. The object of the proceeding for confirmation is to furnish an opportunity for inquiry respecting the acts which have been done under the license to sell, and to obtain the decision of the court, whether, under all the existing circumstances, the sale should be set aside or approved. If the court has jurisdiction to prosecute this inquiry and to make this decision, its approval must, upon principle, be received as an adjudication that such acts have taken place as were necessary to justify the sale, that it has been made as reported, or as disclosed by the order of

v. Plain, 91 Mo. 117; Henry v. McKerlie, 78 Mo. 416; Perry v. Blakey, 5 Tex. Civ. App. 331; Pendleton v. Shaw, 18 Tex. Civ. App. 439; Loyd v. Waller, 74 Fed. Rep. 601.

¹ Koehler v. Ball, 2 Kan. 172, 83 Am. Dec. 451; Briggs v. Tye, 16 Kan. 291; Havens v. Pope (Kan. App.), 62 Pac. Rep. 538; Commissioners v. McIntosh, 30 Kan. 239. In this State, however, when the sale is probate or judicial, the order of confirmation has the same effect as in other States. Thompson v. Burge, 60 Kan. 549, 72 Am. St. Rep. 369

confirmation, and that as made it should be and is approved. When afterwards some attempt is collaterally made to avoid the sale, and involves an inquiry which should have been pursued by the court before directing the confirmation, such inquiry may fairly be regarded as no longer open, for the reason that the matter has already been adjudicated. As to the matters upon which a court is required to adjudicate in its order of confirmation, we see no reason why its decision should not be binding, and should not preclude the reassertion of any matter which was either passed upon by the court,¹ or which the parties might have had passed upon if they had chosen to bring it to the attention of the court.² Hence, after the confirmation, the purchaser's liability is established, and he can no longer assert, while the order of confirmation remains unvacated, that the sale was not made, nor that it included property different from that shown by the report or confirmation, nor that the title was defective, nor that reasons existed for releasing him from his bid, nor any other matter inconsistent with the order of confirmation.³

The only question strictly material here is, to what extent does the confirmation of the sale protect the purchaser from the claim that the sale is void. In the first place, if there is an alleged failure to comply with some direction of the

¹ State N. B. v. Neel, 53 Ark. 110, 22 Am. St. Rep. 185; Hammond v. Cailleaud, 111 Cal. 206, 52 Am. St. Rep. 167; Klein v. Loeber, 82 Ill. App. 528; Thompson v. Burge, 60 Kan. 549, 72 Am. St. Rep. 369; Kincaid v. Tate, 88 Ky. 392; Watson v. Tromble, 33 Neb. 450; 29 Am. St. 492; Thompson v. Davidson, 76 Va. 338; Allison v. Allison, 88 Va. 328.

² Willis v. Nicholson, 24 La. Ann. 545; Cockey v. Cole, 28 Md. 276, 92 Am. Dec. 604; Hotchkiss v. Cutting, 14 Minn. 537; Brown v. Gilmer, 8 Md. 322; Thorn v. Ingram, 25 Ark. 58; Osman v. Traphagan, 23 Mich. 80; Conover v. Musgrove, 68 Ill. 58; McRae v. Danner, 8 Or. 63; Dawson v. Litsey, 10 Bush, 408; Wilcox v. Raben, 24 Neb. 368; Speet v. Pullman P. C. Co., 121 Ill. 33.

³ Brummagin v. Ambrose, 8 Cal. 368; Barron v. Mullin, 21 Minn. 376; Mechanics' S. B. & L. A. v. O'Connor, 29 Ohio St. 655; Dresbach v. State, 41 Ohio St. 70; Sackett v. Twining, 18 Pa. St. 199, 57 Am. Dec. 599; Long v. Weller, 29 Gratt. 352.

decree or of the law with which the court had power to dispense before the sale, it may generally dispense with it afterwards, and the confirmation is equivalent to a dispensing with such direction or condition, as where the officer did not sell the property upon the terms required by the decree or order of sale, in which case its confirmation must be accepted as an approval of the different terms imposed or accepted by the officer and disclosed to the court by his report of the sale, or otherwise.¹

The chief value of the order of confirmation to the purchaser is to protect him from the claim that some supposed condition precedent to the sale has not been complied with, and hence that the sale cannot be sustained. The order of confirmation is equivalent to an adjudication either that such condition precedent did in fact exist, or, where the court had power to dispense with it, that the court regarded the sale as one proper to be approved, notwithstanding the omission of such condition. In the first place, in the absence of evidence to the contrary, the order of confirmation undoubtedly creates a presumption of the regularity of the original proceedings, and it cannot be successfully insisted that a sale was void because the record or other evidence fails to show the existence of some fact which ought to have preceded the sale. It will, therefore, be presumed in support of an order of confirmation that there was proof of the posting of the notices of the sale,² or that the administrator gave the bond necessary to authorize him to make the sale,³ or that a citation had been issued and served as the law directs on the filing of an application for a guardian's sale, and prior to the entry of the order of sale.⁴ After a sale

¹ *Thorn v. Ingram*, 25 Ark. 58; *Jacob's Appeal*, 23 Pa. St. 477; *Robertson v. Smith*, 94 Va. 250, 64 Am. St. Rep. 723; *Emery v. Vroman*, 19 Wis. 689, 88 Am. Dec. 726.

² *Lariner v. Wallace*, 36 Neb. 444; *Ferguson v. Templeton* (Tex. Civ. App.), 32 S. W. Rep. 148.

³ *Andrews v. Goff*, 17 R. I. 205.

⁴ *Butler v. Stephens*, 77 Tex. 599.

has been confirmed, it cannot be defeated by showing collaterally that there was a failure to appraise the property,¹ or a defect in the notices of sale,² or that the administrator did not exact security for the payment of the purchase money,³ or that the commissioner who made the sale was not authorized to make it,⁴ or that the officer departed from the order of sale prescribed by the decree,⁵ or that the summons served on the heirs was returnable in ten days instead of twenty, or that there was no notice of the application for the confirmation of the sale, and that an appointment of a guardian *ad litem* was made without inquiry respecting his fitness,⁶ or that the sale was for cash when the law required it to be upon credit,⁷ or that the sale was improperly adjourned from the court house, where it was advertised to take place, to another place in the county near the land in question,⁸ or that the letters of administration were void because they did not bear upon their face the impress of the seal of the court.⁹ If the order of sale incorrectly describes the land intended to be sold, but contains some elements of description which, if pursued, may show the land to which the order was intended to apply, and it is correctly described in the order of confirmation, this may, perhaps, cure the infirmity of the order. The court in this case said: "We are strongly inclined to the opinion that where such a sale has been brought in question in a collateral

¹ Neligh v. Keene, 16 Neb. 407; Apel v. Kelsey, 47 Ark. 413; Noland v. Barrett, 122 Mo. 181, 43 Am. St. Rep. 572.

² Wyant v. Tutbill, 17 Neb. 495; Richardson v. Butler, 82 Cal. 174, 16 Am. St. Rep. 101; Zillner v. Gerichten, 111 Cal. 73; Thompson v. Burge, 60 Kan. 549, 72 Am. St. Rep. 369; Hugo v. Miller, 50 Minn. 105.

³ Wilkerson v. Allen, 67 Mo. 502.

⁴ Core v. Stricker, 24 W. Va. 689.

⁵ McGavock v. Bell, 3 Coldw. 512.

⁶ McGlawhorn v. Worthington, 98 N. C. 199.

⁷ Cassells v. Gibson (Tex. Civ. App.), 27 S. W. Rep. 725.

⁸ Thompson v. Burge, 60 Kan. 549, 72 Am. St. Rep. 369.

⁹ Dennis v. Bint, 122 Cal. 39, 68 Am. St. Rep. 17.

manner, the decree of confirmation should protect the purchaser, and be preclusive of all questions save that of the jurisdiction of the court over the estate, which, as we have seen, the court had in this instance. It is possible for a sale to be reported and confirmed without any previous order having been made, and the interested parties be content with the transaction; and it would seem a vicious principle that would admit of their allowing the sale to be perfected when, by an appeal, they could have it avoided, and afterwards avail themselves of the defect in a collateral suit for the property against, as in this case remote purchasers.”¹ The Code of Civil Procedure of California declares, with respect to probate sales, that “all sales must be under oath, reported to and confirmed by the court, before the title to the property sold passes.” In an action of ejectment, it appeared that defendant’s title was based on a probate sale; that the return of sales, as offered and received in evidence, was not verified, but that the order of confirmation contained a recital, “that the return of sale was duly verified by affidavit.” The court said: “This recital is conclusive in the present case, and a finding of fact to the contrary does not in any manner affect the conclusiveness of the recital in the decree. The fact was not a jurisdictional one and the principle applicable to the inconclusiveness of statements, or recitals in judgments, conferring jurisdiction, does not apply.”²

The curative powers of orders of confirmation extend to voidable, rather than to void sales. If a sale is void because the court did not have jurisdiction to order it, or because it included property not described in the decree or order of sale, an order confirming it is necessarily inoperative. “The sale being void, there was no subject-matter upon which the order of confirmation could act. If the

¹ *Corley v. Goll*, 8 Tex. Civ. App. 184.

² *Dennis v. Winter*, 63 Cal. 16.

court had no jurisdiction to order the sale, it had none to confirm it. Where there is no power to render a judgment, or to make an order, there can be none to confirm or execute it.”¹ Thus where an order of sale is necessary, its absence cannot be supplied by an order confirming the sale. If there was no pre-existing order of sale, or if, though such order was entered, the court did not have jurisdiction to enter it because of the failure to give notice of the application therefor, or for any other reason, the court not having jurisdiction to order the sale is equally without jurisdiction to confirm a sale made under its void order.² If, after property is sold at probate sale to the highest bidder, he fails to comply with his bid, and another person is substituted in his place, and is reported to the court as the purchaser, and the sale is confirmed to the latter, he cannot avoid the sale and be exonerated from paying the purchase price. “The mere substitution of one person for another cannot affect the validity of the sale. The order directing the sale, and the order confirming it, give vitality to purchase.”³

The irregularities which are cured by the entry of a decree or order of confirmation relate chiefly, if not exclusively, to the proceedings of the court and its officers or of the person conducting the sale. The sale may have been attended by wrongful acts or devices of the purchaser, or by the positive fraud either of himself or of others, of which he had notice, actual or presumed. Questions involving these frauds are

¹ *Minn. Co. v. St. Paul Co.*, 2 Wall. 609; *Pike v. Wassall*, 94 U. S. 74; *Gaines v. New Orleans*, 6 Wall. 642; *Montgomery v. Samory*, 99 U. S. 482; *Townsend v. Tallant*, 33 Cal. 54, 91 Am. Dec. 617; *Shriver v. Lynn*, 2 How. (U. S.) 57; *Hawkins v. Hawkins*, 28 Ind. 70. See *Bethel v. Bethel*, 6 Bush, 65.

² *Culver v. Hardenburgh*, 37 Minn. 225; *Cunningham v. Anderson*, 107 Mo. 321, 28 Am. St. Rep. 417; *Young v. Downey*, 145 Mo. 250, 68 Am. St. Rep. 568; *Willamette R. E. Co. v. Hendrix*, 28 Or. 485, 52 Am. St. Rep. 800; *Glasgow v. McKinnon*, 79 Tex. 116.

³ *Halleck v. Guy*, 9 Cal. 197, 70 Am. Dec. 643; *Ewing v. Higby*, 7 Ohio, pt. 1, p. 198, 28 Am. Dec. 633.

not ordinarily presented for consideration at the time the sale comes on for approval or disapproval. Their existence is generally not discovered until a later date. When they are not suggested to the court by the return of sale, or by some other means, they remain open, notwithstanding the decree of confirmation.¹ The better opinion, however, in our judgment is, that such sales are not absolutely void in the sense that they are subject to collateral attack.² Relief may sometimes be had by an application to the court for an order vacating the order of confirmation and setting aside the sale,³ or by an independent suit in equity, relying upon fraud, surprise, or other sufficient ground for equitable interposition.⁴

As the purchaser's title is dependent upon the order of confirmation, whatsoever destroys that order destroys his title. Usually, if after a sale under a judgment or decree to a third person it is reversed, the reversal does not impair his title. The rule is necessarily different where it is the order confirming the sale which is reversed. The purchaser, though not ordinarily a party to the suit, is necessarily a party to the order of confirmation, and to any proceeding taken for its reversal, and such reversal necessarily affects him by removing, as it does, an indispensable link in his chain of title.⁵

§ 45. **Deed Essential to the Transfer of Legal Title.**—

A conveyance is necessary to invest the purchaser at an execution, chancery or probate sale with the legal title.⁶ In Maryland, Texas and Louisiana, this rule seems not to apply

¹ *Jackson v. Ludeling*, 21 Wall. 633; *City Bank v. Walden*, 1 La. Ann. 46; *Sharpley v. Plant* (Miss.), 28 South. Rep. 799.

² *Palmerton v. Hoop*, 131 Ind. 23.

³ *Kaupman v. Nicewaner*, 60 Neb. 208.

⁴ *Springston v. Morris*, 47 W. Va. 50.

⁵ *Dunfee v. Childs*, 45 W. Va. 155.

⁶ *Hayes v. N. Y. M. Co.*, 2 Colo. 273; *Goss v. Meadors*, 78 Ind. 528; *Freeman on Executions*, sec. 324; *Merrit v. Terry*, 13 Johns. 471; *Doe v. Hardy*, 52 Ala. 291; *Hudgens v. Jackson*, 51 Ala. 514; *Van Alstyne v.*

to execution sales,¹ though in Texas a conveyance by an administrator is conceded to be essential to the transfer of the legal title after a probate sale.²

§ 46. **Deed, When and by Whom to be Made.**—In Massachusetts and Maine, under statutes prescribing that licenses for sales should continue in force for one year only after they were given, it was held that the execution of a deed was a part of the sale, and that, if not executed within one year after the granting of the license, it was void.³ We cannot concur in this opinion. A sale is certainly complete when it has been regularly confirmed by the court, and the purchase price has been paid to the person entitled to receive it. Even if this be not true, the purchaser has acquired an equitable title—a right to a conveyance in pursuance of his purchase and payment. A court of equity would recognize and protect this right by decreeing a conveyance.⁴ If a conveyance can be compelled, certainly it ought not to be void merely because made without compulsion.⁵ No conveyance ought to be made before the payment of the purchase money.⁶ If made before such payment, it is void in Indiana.⁷ But, we apprehend that, as a general rule, such a conveyance is voidable rather than void.⁸ If the

Wimple, 5 Cow. 162; *Farmers' Bank v. Merchant*, 13 How. Pr. 10; *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307; *Greenough v. Small*, 137 Pa. St. 132.

¹ *Boring v. Lemmon*, 5 H. & J. 223; *Leland v. Wilson*, 34 Tex. 91; *Fleming v. Powell*, 2 Tex. 225; *Jouet v. Mortimer*, 29 La. Ann. 206.

² *Sypert v. McCowen*, 28 Tex. 638.

³ *Macy v. Raymond*, 9 Pick. 287; *Wellman v. Lawrence*, 15 Mass. 326; *Mason v. Ham*, 36 Me. 573.

⁴ *Platt's Heirs v. McCullough's Heirs*, 1 McLean, 69; *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399.

⁵ *Heward v. Moore*, 2 Mich. 226; *Osman v. Traphagen*, 23 Mich. 80.

⁶ *Barnes v. Morris*, 4 Ired. Eq. 22; *Johnson v. Hines*, 61 Md. 122.

⁷ *Ruckle v. Barbour*, 48 Ind. 274; *Chapman v. Harwood*, 8 Blackf. 82. In Alabama, an order to convey before all the purchase money is paid is a nullity. *Corbitt v. Clenny*, 52 Ala. 480.

⁸ *Osman v. Traphagen*, 23 Mich. 80.

statute, under which a sale is made, does not authorize a conveyance until after the expiration of the time allowed the defendant to redeem his property, a deed made in advance of that time is a nullity.¹ After the right to a deed has become perfect, we believe it may be made at any time.² This remains true, though he whose title is thus conveyed has died either before or after the sale, for if the sale when made is authorized, the death of the party can neither destroy nor suspend the power of the officer making the sale to execute an appropriate conveyance, nor impair its force when executed.³

There may be circumstances from which the execution of a deed may be presumed without strict evidence, as where the purchaser, soon after the sale, takes possession of the property and holds it for many years without objection.⁴ In a few of the States, the execution of a deed seems to be regarded as not essential, and the instrument, when executed, is merely an additional muniment of title.⁵ If the time for redemption has expired, and the purchaser, being in possession, is sued in ejectment, the absence of a conveyance may not be fatal to him, for the proof of the facts showing him to be entitled to a conveyance may be sufficient to negative any right of possession on the part of the plaintiff;⁶ but if it is the purchaser who brings the action to recover possession, or if, for any other reason, it is necessary for him to show the legal title, he must obtain a conveyance,

¹ Freeman on Executions, secs. 316, 325; *Perham v. Kuper*, 61 Cal 331.

² In Illinois, the deed must be made within eight years and three months after the sale, unless the court, on motion, authorizes it to be made at a later date. *Rucker v. Dooley*, 49 Ill. 377, 95 Am. Dec. 614; *Cottingham v. Springer*, 88 Ill. 90.

³ *Thomas v. Thomas*, 87 Ky. 343; *United States v. Insley*, 54 Fed. Rep. 221.

⁴ *Norman v. Eureka Co.*, 98 Ala. 479, 39 Am. St. Rep. 45.

⁵ *Onarato's Interdiction*, 46 La. Ann. 73; *Leland v. Wilson*, 34 Tex. 91; *Remington v. Linthicum*, 14 Pet. 92.

⁶ *Diamond v. Turner*, 11 Wash. 189.

for without it, however perfect his equity, it must be conceded that, in point of law, he has not the title.¹

An administrator's executor's or guardian's deed must be made in person. These officers exercise powers in the nature of trusts wherein special confidence is reposed. Hence, they cannot delegate their authority to agents,² though in the event of their refusal or their death or other inability to act, relief may be granted in some appropriate proceeding, either by compelling their action or by appointing some one to act for them.³ Sheriffs and constables, on the other hand, may have deputies, and such deputies are competent to execute conveyances in the names of their principals.⁴ The power of such officers does not terminate with their terms of office. Their successors, unless authorized by statute, have no authority to convey property. The conveyance must be executed by him who made the sale, though he no longer continues to be an officer,⁵ or by his deputy, for the deputy, notwithstanding the expiration of the principal's official term, retains, unless his authority has been revoked, power to execute conveyances in the name of the principal.⁶ If there is no officer or person in existence competent to execute the deed, the court will upon motion appoint some person and thereby invest him with power to make the appropriate conveyance.⁷ In Mississippi, an administrator *de bonis non* cannot execute a conveyance where the sale was made by his predecessor in office.⁸ But we judge the better

¹ Freeman on Executions, sec. 324; Blodgett v. Perry, 97 Mo. 263, 10 Am. St. Rep. 307; Turner v. Sawyer, 150 U. S. 578.

² Gridley v. Phillips, 5 Kan. 349.

³ Dean v. Lanford, 9 Rich. Eq. 423.

⁴ Freeman on Executions, sec. 327.

⁵ People v. Bowring, 8 Cal. 406, 68 Am. Dec. 331; Lemon v. Craddock, Litt. Sel. Cas. 261, 12 Am. Dec. 301; Porter v. Mariner, 50 Mo. 364.

⁶ Tuttle v. Jackson, 6 Wend. 213; Mills v. Tukey, 22 Cal. 373, 83 Am. Dec. 74; Robinson v. Hall, 33 Kan. 139.

⁷ People v. Bowring, 8 Cal. 406, 68 Am. Dec. 331; Sickles v. Hogeboom, 10 Wend. 562; Head v. Daniels, 38 Kan. 11.

⁸ Davis v. Brandon, 1 How. (Miss.) 154.

rule to be, that such an administrator may complete whatever the first administrator ought to have done.¹

A conveyance made to a person not entitled to receive it, as where a deed is given to one as assignee, when no assignment has been made, is void.² "The deed can only be made to the original purchaser at the sale, or to his successor in interest. The interest of the purchaser may be assigned; or it may, at his death, become vested in his heirs or devisees, or his executors or administrators, in trust for such heirs or devisees. Though the statute makes no direct provision for the issuing of a deed to any one but the purchaser, his power to assign the certificate of purchase, and the consequent right of his assignee to a conveyance seem to be conceded.³ The fact of the assignment should be recited in the sheriff's deed; and, when so recited, the deed is at least *prima facie* evidence that the assignment was made as therein stated."⁴

§ 47. **Deed, When Void Because not in Proper Form.**—The instances in which a deed, issued in pursuance of an execution or chancery sale, is void for errors, defects or mistakes in form, are very rare. In fact, any instrument executed by an officer authorized to make it, purporting to convey the property, is probably sufficient, if the acts necessary to authorize him to make a conveyance can be shown.⁵ Of course, the deed must be executed with the formalities essential to other deeds, and must show that the person who signs it is acting in an official capacity, and not merely conveying his own title to the property. In some States a form for sheriff's deeds is prescribed by

¹ Gridley v. Phillips, 5 Kan. 354.

² Carpenter v. Sherfy, 71 Ill. 427; Hannah v. Chase, 4 N. D. 351, 50 Am. St. Rep. 686.

³ Gibbs v. Davis, 168 Ill. 205; Ward v. Lowndes, 96 N. C. 367.

⁴ Freeman on Executions, sec. 328; Messerschmidt v. Baker, 22 Minn. 81.

⁵ Freeman on Executions, sec. 329; Hill v. Reynolds, 93 Me. 25, 74 Am. St. Rep. 329; Exum v. Baker, 118 N. C. 545.

statute. These statutes are generally, but not universally, declared to be directory merely.¹

Deeds executed by executors, administrators or guardians, are, in many States, treated with less indulgence than those made by sheriffs. This is particularly the case where a statute has directed that some statement or recital shall be set forth in the deed. Such statutes, with reference to administrator's and guardian's deeds, have been held imperative, and not directory merely. Thus, where a statute required an order to be set forth at large, a deed merely referring to such order, and stating its substance, was adjudged void.² The correctness of this decision may be doubted. Perhaps an omission to refer to an order, or a reference which does not fully describe the order, will, under a statute similar to the one just alluded to, render the deed void,³ but, in our judgment, a deed which sets forth the substance of the order ought to be regarded as sufficient.⁴ In truth, we see no reason for regarding these statutory provisions respecting recitals in a deed as otherwise than directory.⁵

Although a statute requires the order of sale, and also that of confirmation, to be referred to or set out in the deed, a mere mistake in the reference is not fatal, if it appears from the deed, taken as a whole, that the reference, as made, is a mistake, and that it was intended to embrace the orders under which the sale and deed were, in fact, made.⁶ In the absence of a statute providing otherwise, it

¹ *Wright v. Young*, 6 Or. 87; *Bludworth v. Poole*, 21 Tex. Civ. App. 551; *Freeman on Executions*, sec. 329; *Armstrong v. McCoy*, 8 Ohio, 128, 31 Am. Dec. 435; *Bettison v. Budd*, 17 Ark. 558, 65 Am. Dec. 442; *Ogden v. Walters*, 12 Kan. 290; *Perkins' Lessee v. Dibble*, 10 Ohio, 433, 36 Am. Dec. 97; *Holman v. Gill*, 107 Ill. 467.

² *Smith v. Finch*, 1 Scam. 323.

³ *Atkins v. Kinnan*, 20 Wend. 241, 32 Am. Dec. 534. *Contra*: *Hamman v. Mink*, 99 Ind. 279.

⁴ *Sheldon v. Wright*, 7 Barb. 39, 5 N. Y. 497.

⁵ *Stryker v. Vanderbilt*, 27 N. J. Law, 68.

⁶ *Sheldon v. Wright*, 5 N. Y. 497; *Thomas v. Le Baron*, 8 Met. 361;

ought to be sufficient for a conveyance by an executor, administrator, or guardian to show that he is such, and intends in making the conveyance to act in that capacity.¹ However desirable the recitals showing the orders and other acts authorizing the sale, they are not indispensable, and the existence of those orders and acts may be proved by other competent evidence. If, in making recitals, some error occurs, resulting in a variance between the recital and the fact or thing recited, this is not fatal to the instrument as a conveyance of title,² nor is it material that he who makes a conveyance describes himself as an executor when he is in fact an administrator, or as an administrator when he is an executor.³ The same rule applies to mistakes and omissions in the recitals in deeds, made in pursuance of execution sales.⁴ Irrespective of any statutory directions on the subject, every administrator's, executor's or guardian's deed should refer to the authority or license under which it is made; should state that the person making it acted under such license; and should contain apt words to convey the estate of the ward or decedent, as contradistin-

Jones v. Taylor, 7 Tex. 242, 56 Am. Dec. 48; *Moore v. Wingate*, 53 Mo. 398; *Glover v. Ruffin*, 6 Ohio, 255; *Clark v. Sawyer*, 48 Cal. 133; *Mitchell v. Bliss*, 47 Mo. 353; *Speck v. Riggins*, 40 Mo. 405; *Davis v. Kline*, 76 Mo. 310; *Williams v. Woodman*, 73 Me. 163.

¹ *Coffin v. Cook*, 106 N. C. 376; *Langdon v. Strong*, 2 Vt. 234.

² *Brubaker v. Jones*, 23 Kan. 411; *Williams v. Wood*, 73 Me. 163; *Thomas v. Le Baron*, 8 Met. 355; *Garner v. Tucker*, 61 Mo. 427; *Melton v. Fitch*, 125 Mo. 281.

³ *Mobberly v. Johnson*, 78 Ky. 273; *Cooper v. Robinson*, 7 Cush. 184.

⁴ *Freeman on Executions*, sec. 329; *Brooks v. Rooney*, 11 Ga. 423, 56 Am. Dec. 430; *Gourdin v. Davis*, 2 Rich. 481, 45 Am. Dec. 745; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Haskins v. Wallet*, 63 Tex. 213; *Phillips v. Coffee*, 17 Ill. 154, 63 Am. Dec. 357; *Keith v. Keith*, 104 Ill. 401; *Humphrey v. Beeson*, 1 G. Greene, 199, 48 Am. Dec. 370; *Harrison v. Maxwell*, 2 N. & McC. 347, 10 Am. Dec. 611; *McGuire v. Kouns*, 7 Mon. 386, 18 Am. Dec. 187; *Martin v. Wilbourne*, 2 Hill, 395, 27 Am. Dec. 393; *Hind's Heirs v. Scott*, 11 Pa. St. 19, 51 Am. Dec. 506; *Lamb v. Sherman*, 19 Neb. 681; *Davidson v. Kahn*, 119 Ala. 364; *Beardsley v. Higman*, 58 Neb. 257.

guished from the private estate of the person executing the deed;¹ but it need not recite all the steps taken in making the sale, as that the sale was at public auction, and that the grantee was the highest bidder.² Where statutes exist, directing what recitals shall be set forth in sheriff's deeds, occasional decisions may be found declaring such deeds void, because of their non-compliance with the statute. These decisions will generally be found restricted to cases where the omission in the deed was of a matter absolutely essential to the support of the sale, as the omission to recite the judgment,³ or the time of the sale, where sales can, under the statute, take place only at certain designated times, for instance, during the term of the court.⁴ In other words, the deed must show an authority to sell, and that such authority was pursued substantially as prescribed by law. Beyond this, even in States where statutes undertake to specify the recitals to be inserted in a sheriff's deed, omissions and misrecitals are not fatal.⁵

Whether the deed be made pursuant to an execution or a judicial sale, the description of the property which has been sold and which the officer intends to convey is of special importance. We apprehend that the rules by which the descriptive parts of a deed must be interpreted are the same, whether the deed be voluntary and executed by the grantor in person, or involuntary and executed on his behalf by some officer authorized by law.⁶ The description must

¹ *Jones v. Taylor*, 7 Tex. 242, 56 Am. Dec. 48; *Bobb v. Barnum*, 59 Mo. 394; *Griswold v. Bigelow*, 6 Conn. 258; *Lockwood v. Sturdevant*, 6 Conn. 373. The two cases last named are limited in *Watson v. Watson*, 10 Conn. 77.

² *Kingsbury v. Wild*, 3 N. H. 30.

³ *Dufour v. Camfranc*, 11 Mart. 607, 13 Am. Dec. 360.

⁴ *Tanner v. Stine*, 18 Mo. 580, 59 Am. Dec. 320; *Martin v. Bonsach*, 61 Mo. 556.

⁵ *Buchanan v. Tracy*, 45 Mo. 437; *Strain v. Murphy*, 49 Ind. 337.

⁶ *Paller v. Johnson*, 81 Ga. 254; *Smith v. Nelson*, 110 Mo. 552; *Perry v. Scott*, 109 N. C. 374; *Overand v. Menzer*, 83 Tex. 122. "In regard, however, to the description of the property conveyed, the

be capable of being applied to some one tract or some definite part thereof.¹ It must not be equally applicable to two or more tracts.² Descriptive words which are inadequate in a voluntary conveyance are not necessarily so in one executed pursuant to a judicial or execution sale, because they may be made certain by its recitals and other writings which are thereby so referred to that they may be properly considered as a part of the deed for the purpose of making its descriptive language more perfect. Thus, such a conveyance is ordinarily preceded by a levy and advertisement of sale, and often by a certificate of purchase, some or all of which are referred to in the deed. Hence, in addition to the words used for the purpose of description, it usually appears from the recitals that the land intended to be conveyed is that levied upon under a writ designated, and is that land which, at a time named, was advertised for sale, and afterwards sold, and though the descriptive words in the deed may be inadequate, or, in some respects, erroneous, such inadequacy may be made adequate, or such error corrected, by reference to the officer's return of his levy, or his notice of sale, or to that part of his return stating the property sold, and the person by whom it was purchased. In either event, we think, the

rules are the same, whether the deed be made by a party in his own right, or by an officer of the court. The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with legal rules, the object they were intended to accomplish." *White v. Luning*, 93 U. S. 514; *Marshall v. Greenfield*, 8 G. & J. 358, 29 Am. Dec. 559; *Herrich v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841; *Atkinson v. Cummins*, 9 How. (U. S.) 479. *Nelson v. Bradhach*, 44 Mo. 596, 100 Am. Dec. 328, seems to be inconsistent with the views here expressed.

¹ *Freeman on Executions*, sec. 330; *Jones v. Carter*, 56 Mo. 403.

² *Tatum v. Croom*, 60 Ark. 487; *Cadwalader v. Nash*, 73 Cal. 43; *Borders v. Hodges*, 154 Ill. 498; *Beze v. Calvert*, 2 Tex. Civ. App. 202; *Harris v. Schaeffer*, 86 Tex. 314.

description must be regarded as sufficient to divest the title of the judgment debtor if all doubt is removed by incorporating in it the information derived from these various writings, all of which merely constitute successive steps in a proceeding of which the deed is but the last.¹

A conveyance may contain several elements of description, some of which are false. This is not fatal if means exist of separating the false from the true, and the latter are sufficient to identify the property, as where the lands are described as in district number two, whereas they are in number three, but other facts of description are stated, and from them and maps offered in evidence it appears that the lands cannot be in number two, but must be in number three,² or a deed describes lands by the number of the survey or patent and also gives the field notes, in which case the latter may be allowed to control, if applicable to the lands sold.³ It is perhaps implied that the lands sold are those of the defendant, if the sale was under execution, or of the ward or decedent, if it was by a guardian, executor, or administrator, and hence if a description is equally applicable to two or more tracts, only one of which the defendant, ward, or decedent owned, it will be held to refer to that one.⁴ It has been said it will be inferred in support of a conveyance made by an administrator that it was intended to apply to a particular lot which the decedent is shown to have owned in the town named in the deed, that in the absence of proof or suggestion to the contrary it will be presumed that he owned no other lot, and hence that the words of description will be applied to that lot, though defective in failing to describe, or in inaccurately describing,

¹ *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841; *Hermann v. Likens*, 90 Tex. 448; *Turner v. Crane*, 19 Tex. Civ. App. 369.

² *Kerlicks v. Keystone L. & C. Co.* (Tex. Civ. App.), 21 S. W. Rep. 623.

³ *Minor v. Lumpkin* (Tex. Civ. App.), 29 S. W. Rep. 800.

⁴ *Bray v. Adams*, 114 Mo. 486.

one of its boundaries.¹ In California, it was at one time thought that a judicial sale could not transfer title unless the decree directing it contained a description of the property to be sold, so perfect in itself, that it could be understood and located without consulting other deeds or records, to which it made reference for the purposes of description. This view no longer prevails.² It is by no means essential that from a mere inspection of the description the court should be enabled to know what lands are intended. The tract may be designated by some name not understood by the court, but perfectly familiar to all persons acquainted with the neighborhood in which the land is situated. Evidence may always be received to show the signification of such a name, or to prove that any other descriptive words, though apparently meaning less or uncertain, do, in fact, designate a particular tract in such a manner that its identity must be apparent to persons to whom it is familiar.³ The deed is but the culmination of various antecedent proceedings upon which it rests and which it is obviously designed to make effective. The intent of the officer in executing the deed, where not sufficiently disclosed by the deed itself, may often be made apparent by consulting these proceedings. If the description employed by him is ambiguous we think these proceedings may be inspected for the purpose of making it clear, and that it must be construed as applying to the lands for which the records in the cause show that a conveyance should have been made, unless to so construe it is to do violence to its express terms.⁴ Probably the descriptive words in a decree directing a sale of real property, or of a deed undertaking to convey it,

¹ *Laub v. Buckmiller*, 17 N. Y. 620.

² *De Sepulveda v. Baugh*, 74 Cal. 468, 5 Am. St. Rep. 455.

³ *Freeman on Executions*, sec. 330; *Hockett v. Alston* (Ind. T.), 58 S. W. Rep. 675; *Smith v. Crosby*, 86 Tex. 15, 40 Am. St. Rep. 818; *Pendleton v. Shaw*, 18 Tex. Civ. App. 439.

⁴ *McGhee v. Hoyt*, 106 Pa. St. 516; *West v. Cochran*, 104 Pa. St. 482.

must so refer to any other writing necessary to the understanding of the deed that no search is essential to enable intending bidders to determine what ought to be sold, or an officer executing a writ of assistance to know of what he should deliver possession under the deed. Hence, a conveyance of a designated tract of land, except such parts thereof as had been laid out in town lots by J. R., and by him sold and conveyed before a specified date, was held to be insufficient and void.¹

¹ Bowen v. Wickersham, 124 Ind. 404, 19 Am. St. Rep. 106.

CHAPTER V.

THE LEGAL AND EQUITABLE RIGHTS OF PURCHASERS
AT VOID SALES.

SECTION.

48. Purchaser's Right to Resist the Payment of His Bid.
49. Purchaser's Right to Recover Money Paid.
- 49a. Of the Right of the Purchaser to Retain the Property until Repaid the Amount of His Bid.
50. Purchaser's Right to Urge Acts of Ratification as Estoppels in His Favor.
- 50a. Estoppel to Question the Validity of a Sale.
51. Purchaser's Right to Subrogation Denied.
52. Purchaser's Right to Subrogation Affirmed, under Execution and Chancery Sales.
53. Purchaser's Right to Subrogation Affirmed under Probate Sales.
54. Right to Subrogation Whether Exists Only in Favor of Innocent Purchasers.
55. Purchaser's Right to Aid of Equity in Supplying Omissions and Correcting Mistakes.

§ 48. **Purchaser's Right to Resist the Payment of His Bid.**—If the purchaser at a void execution or judicial sale is so fortunate as to discover the true character and effect of the sale, prior to the actual payment of the purchase price, he will, of course, seek to avoid making such payment. No doubt the bidder at a void sale is entitled to be released from his bid. “The purchaser at a partition sale

is entitled to the whole title partitioned. If, from any irregularities or defects in the suit or in the proceedings, the purchaser would not, by completing his bid and receiving his conveyance, become invested with the whole title with which the court assumed to deal, then he will be released from his bid. Hence, if jurisdiction has not been acquired over one of the co-tenants the purchaser will be released."¹ So in purchases under execution sales, the purchaser cannot be compelled to make payment, if the proceedings are so defective, in any respect, that they cannot divest the title of the judgment debtor.² The same principle applies to sales of the property of minors and of decedents.³ Every purchaser has a right to suppose that, by his purchase, he will obtain the title of the defendant in execution, in case of execution sales, and of the ward or decedent in the case of a guardian's or administrator's sale. The promise to convey this title, is the consideration, upon which his bid is made. If the judgment or order of sale is void, or if, from any cause, the conveyance, when made, cannot invest him with the title held by the parties to the suit or proceeding, then his bid, or other promise to pay, is without consideration, and cannot be enforced. He may successfully resist any action for the purchase money, whether based upon the bid or upon some bond or note given by him.⁴ In Mississippi, however, he cannot avoid paying the purchase price of personal property of which he has ob-

¹ Freeman on Co-tenancy and Partition, sec. 547.

² Freeman on Executions, sec. 313*h*.

³ Picard v. Montrose (Miss.), 17 South. Rep. 375.

⁴ Laughman v. Thompson, 6 S. & M. 259; Campbell v. Brown, 6 How. (Miss.) 230; Barte v. Thompkins, 4 Sneed, 623; Todd v. Dowd, 1 Metc. (Ky.) 281; Barrett v. Churchill, 18 B. Mon. 387; Washington v. McCaughan, 34 Miss. 304; Riddle v. Hill, 51 Ala. 224; Verdin v. Slocum, 71 N. Y. 345; Goode v. Crow, 51 Mo. 212; Boykin v. Cook, 61 Ala. 472; Burns v. Ledbetter, 56 Tex. 282; Dodd v. Neilson, 90 N. Y. 243; Threft v. Fritz, 7 Ill. App. 55; Short v. Porter, 44 Miss. 533; note to Burns v. Hamilton, 70 Am. Dec. 580.

tained, and still retains, possession by virtue of the sale.¹

The distinction between void sales and defective titles must be kept in view, to avoid any misapprehension of the rights of one who has purchased at an execution or judicial sale, without, in fact, obtaining anything. If he obtains nothing because of a defect in the proceedings, he can defeat an action for the amount of his bid. If, on the other hand, the proceedings are perfect, but the defendant, or ward, or decedent, had no title to be sold or conveyed, the purchaser is nevertheless bound by his bid, if he has permitted an order of confirmation to be entered against him, without objection; or, if notwithstanding his objections, such order has been entered and remains in force. In some of the States *caveat emptor* is the rule of all execution and judicial sales. Each bid is made for such title as the defendant, ward or decedent may have, and is, therefore, binding, whether either had title or not.² "But the better rule is that, in equity sales, the purchaser is entitled to receive a title free from equities and

¹ Washington v. McCaughan, 34 Miss. 304; Martin v. Tarver, 43 Miss. 517; Jagers v. Griffin, 43 Miss. 134.

² Freeman on Co-tenancy and Partition, sec. 547; Osterberg v. Union Trust Co., 93 U. S. 424; McMann v. Keith, 49 Ill. 389; Short v. Porter, 44 Miss. 533; Bassett v. Lockard, 60 Ill. 164; Boykin v. Cook, 61 Ala. 472; England v. Clark, 4 Scam. 486; Boro v. Harris, 13 Lea, 36; Holmes v. Shafer, 78 Ill. 578; Dunn v. Frazier, 8 Blackf. 432; Rodgers v. Smith, 2 Ind. 526; Dean v. Morris, 4 G. Greene, 312; Islay v. Stewart, 4 D. & B. 160; Richardson v. Vicker, 74 N. C. 278; Rollins v. Henry, 78 N. C. 342; Pinkerton v. Harrell, 106 Ga. 102, 71 Am. St. Rep. 242; Frost v. Atwood, 73 Mich. 67, 16 Am. St. Rep. 560; Pope v. Benster, 42 Neb. 304, 47 Am. St. Rep. 703; Long v. McKissick, 50 S. C. 228. The rule was applied against purchasers at probate sales in Worthington v. McRoberts, 9 Ala. 297; Jennings v. Jennings Admr., *Id.* 291; Owen v. Slatter, 26 Ala. 547, 62 Am. Dec. 745; Byrd v. Turpin, 62 Ga. 591; Colbert v. Moore, 64 *Id.* 502; Tilley v. Bridges, 105 Ill. 336; London v. Robertson, 5 Blackf. 276; Cogan v. Frisby, 36 Miss. 185; Thompson v. Munger, 15 Tex. 523, 65 Am. Dec. 176; Burns v. Hamilton, 33 Ala. 210, 70 Am. Dec. 570; Jones v. Warnock, 67 Ga. 484; King v. Gunnison, 4 Pa. St. 171.

incumbrances of which he had no notice; and if, by the sale, he will not receive such title, he will not, on his making objection, be compelled to complete his purchase, but will be released therefrom, unless the title can be made good, or other just relief awarded.”¹ Therefore, in every case in which a sale is made subject to its confirmation by the court, the purchaser should take pains to inform himself of every matter which, if known, would lead him to seek release from his bid, whether consisting of a defect in the title or a lien on the property, and should urge such matter when discovered as a ground for refusing confirmation of the sale.² When the sale has been made pursuant to a decree in chancery, and the purchaser seeks relief by resisting its confirmation, he is entitled to have applied in his favor the general principles of equity jurisprudence, and to be released from his bid, when to do otherwise would be to treat him in an unconscionable manner. With respects to defects in the title to the property sold, “the purchaser will be released, and any payment made by him and remaining within the control of the court will be returned if the condition of the title is such that he would not be required to accept it were the contract between him and a private individual. The court is the vendor, and it will not enforce a contract in its own favor, of which it would refuse to decree the execution, if the vendor were a private person.”³ Hence, confirmation can be refused and the purchaser released, though the sale is not absolutely void or the title necessarily defective. A purchaser at a judicial, equally with a purchaser at a private, sale is entitled to a marketable title. He will not be released because of a mere possibility or of a remote or other improbable contingency, if the court, in the exercise of a

¹ Note to *Burns v. Hamilton*, 70 Am. Dec. 575, citing *Scott v. Bentel*, 23 Gratt. 1; *Bolivar v. Zeigler*, 9 S. C. 287; *Monaghan v. Small*, 6 S. C. 177; *Kostenbader v. Spotts*, 80 Pa. St. 430; *Edney v. Edney*, 80 N. C. 81; *Monarque v. Monarque*, 80 N. Y. 320; *Hunting v. Walter*, 33 Md. 60.

² *Hammond v. Chamberlain*, 58 Neb. 445, 76 Am. St. Rep. 103.

³ *Freeman on Executions*, sec. 304*h*.

sound discretion, thinks proper to hold him to his bid;¹ but ordinarily it will release, when the title is not marketable, to the same extent and under the same circumstances under which it would refuse to direct the specific performance of a private sale.² A purchaser's claim to relief is dependent upon his bid being made in the belief that the sale was of a perfect title. If he knew of the defect, or from pursuing inquiries suggested by the pleadings or notice of sale would have known of it, he is not entitled to be released.³ This remains true, though false statements were made at the sale, if he was not deceived by them. Neither they nor defects in the title of which he was aware constitutes any ground for releasing him from his bid.⁴

The confirmation is conclusive on the purchaser, and after that he is precluded from objecting that the title was imperfect or incumbered, and thus avoiding the payment of his bid.⁵ This rule may not be applicable where the sale is made by the court, and the purchaser, instead of being sued in an independent action for the amount of his bid, is brought before the court by motion or other proceeding

¹ *Cambreling v. Pintor*, 125 N. Y. 610.

² *Crouter v. Crouter*, 133 N. Y. 55; *Heller v. Cohen*, 154 N. Y. 299.

³ *Eccles v. Timmons*, 95 N. C. 540; *McKernan v. Neff*, 43 Ind. 503; *Ledyard v. Phillips*, 32 Mich. 13; *Graham v. Bleakie*, 2 Daly, 55; *Riggs v. Powell*, 66 N. Y. 193; *Fryer v. Rockefeller*, 63 N. Y. 298; *Young v. McClung*, 9 Gratt. 336.

⁴ *Re Leard's Estate*, 164 Pa. St. 435.

⁵ *Williams v. Glenn's Admr.*, 87 Ky. 87, 12 Am. St. Rep. 481; *Osterberg v. Union Trust Co.*, 93 U. S. 424; *Dresbach v. Stein*, 41 Ohio St. 70; *Mechanics' S. & B. Assn. v. O'Connor*, 29 Ohio St. 651; *Barron v. Mullen*, 21 Minn. 374; *Holmes v. Shaver*, 78 Ill. 578; *Thomas v. Davidson*, 76 Va. 344; *Hickson v. Rucker*, 77 Va. 135; *Long v. Weller*, 29 Gratt. 347; *Threlkelds v. Campbell*, 2 Gratt. 198, 44 Am. Dec. 384; *Capehart v. Dowery*, 10 W. Va. 130; *Farmers' Bank v. Peters*, 13 Bush, 591; *Housley v. Lindsey*, 10 Heisk. 651; *Anderson v. Foulks*, 2 H. & G. 346; *Farmers' Bank v. Martin*, 7 Md. 342, 61 Am. Dec. 350; *Bassett v. Lockard*, 60 Ill. 164; *Cashion v. Fania*, 47 Mo. 133; *Richardson v. Butler*, 82 Cal. 174, 16 Am. St. Rep. 101; *Watson v. Tromble*, 33 Neb. 368, 29 Am. St. Rep. 492; *Deputronny v. Young*, 143 U. S. 241.

there instituted to obtain some order directing him to comply with his contract of purchase. In *Williams v. Glenn*¹ the court, where a purchaser was ruled to show cause why he should not pay bonds given by him at his bid at a commissioner's sale, refused to release him, though it appeared that he had acquired no title whatever by the sale, but said that the rule was otherwise in such cases when it appeared that the purchaser was induced to make his purchase by a misrepresentation of the person making the sale as to the condition of the title, and the falseness of the representation could not have been discovered with reasonable diligence until after the confirmation. Courts of chancery proceed to a great extent upon the principle, that the parties to the suit and the purchaser are all within its jurisdiction, and remain subject to such orders as it sees proper to make, though after a great lapse of time. Such courts sometimes, even after the payment of the money and the conveyance of the property, bring the parties before them upon suggestions of fraud, misapprehension, surprise, or other ground of equitable relief, and direct the sale to be vacated.² Relief may be granted on the ground of the failure to bring before the court some necessary party to the suit in which the sale was made.³ Speaking of the vacating of a sale after the entry of an order of confirmation, the court of appeals of Virginia said: "It is by no means, therefore, matter of discretion with the court to rescind a sale which it has once confirmed, nor is the sale to be rescinded for mere inadequacy of price, or for an increase of price alone; but some special ground must be laid, such as fraud, accident, mistake, or misconduct on the part of the purchaser, or other person

¹ 87 Ky. 87, 12 Am. St. Rep. 461.

² *Tripp v. Cook*, 26 Wend. 143; *Collier v. Whipple*, 13 Wend. 224; *National Bank v. Sprague*, 21 N. J. Eq. 457; *Smith v. Allen*, 22 N. J. Eq. 572; *Cawley v. Leonard*; 28 N. J. Eq. 467; *Campbell v. Gaidner*, 11 N. J. Eq. 423; *Watson v. Birch*, 2 Ves. Jr. 51.

³ *Meddis v. Fenley*, 98 Ky. 432.

connected with the sale, which has worked injustice to the party complaining. After confirmation, the purchaser at a judicial sale is as much entitled to the benefit of his purchase as a purchaser *in pais*, and the sale in the one case can be set aside only on such grounds as would be sufficient in the other. There is no principle on which any distinction between the two classes of cases can be drawn, and if there be anything in the opinion of the court in *Merchants' Bank v. Campbell*, 75 Va. 455, which can be construed as holding a contrary doctrine, the proposition has been overruled by subsequent decisions."¹

§ 49. **The Purchaser's Right to Recover Back Money Paid.**—Whoever pays out money on account of a purchase made at a void sale, parts with a valuable consideration, for which he acquires nothing. The question then arising, is: Has the purchaser any remedy? and, if so, what is the remedy, and to what cases may it be applied with success. Where the plaintiff is the purchaser, he may, in most States, upon failure of his title, in effect vacate the apparent satisfaction produced by the sale, and obtain a new execution.² To justify the application of this rule, the failure of title must be complete, and the plaintiff must be denied this relief if the defendant had some estate or interest in the property subject to execution, though it proved to be less than the plaintiff believed at the time of the making his bid.³

If the title fails through defects in the proceedings, arising from the neglect or misconduct of the sheriff, the purchaser can sustain an action on the case against that officer.⁴ If the sale of the property of a decedent, minor, or incompetent person is made, but is subsequently vacated,

¹ Virginia, etc., *I. Co. v. Cottrell*, 85 Va. 857, 17 Am. St. Rep. 108.

² Freeman on Executions, secs. 54 and 352; *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *Piper v. Elwood*, 4 Den. 165; *Adams v. Smith*, 5 Cow. 280; *Watson v. Reissig*, 24 Ill. 281.

³ *Conce v. McCoy*, 101 Tenn. 587, 70 Am. St. Rep. 714.

⁴ *Sexton v. Nevers*, 20 Pick. 451, 32 Am. Dec. 225.

or, if for any reason the purchaser is entitled to be released therefrom, he may recover the amount of his bid from the executor, administrator, or guardian to whom it was paid, and in whose custody it remains.¹ Where a purchase is made under a decree in equity, and such decree is reversed for a jurisdictional defect in the proceedings, or where the title fails because the grantee of a mortgagor was not a party to a foreclosure, the plaintiff has the right to prosecute further proceedings. In the case first named, he may have the process properly served, and thus give the court jurisdiction to proceed. In the second named case he may apply to the court, have the sale vacated, the satisfaction cancelled, and then, by supplemental bill, bring in the proper parties, and have the property resold. In either case the purchaser may, by applying to the court in the original suit, have the proceedings conducted for his benefit, though in the name of the original plaintiff.² In New York and Tennessee, if the proceedings are utterly void, the purchaser may recover from the plaintiff the amount paid upon the latter's judgment,³ when the remedy by motion no longer exists in the original action, the plaintiff may be allowed to maintain a second suit, in which he may include with the parties in the first suit all necessary parties omitted therefrom. Hence, if a judgment is entered against a husband foreclosing a mortgage upon a homestead, to which foreclosure his wife

¹ McKay v. Coleman, 85 Mich. 60; *Re Dickerson*, 111 N. C. 108.

² Boggs v. Hargrave, 16 Cal. 559, 76 Am. Dec. 561; Burton v. Lies, 21 Cal. 87; Johnson v. Robertson, 34 Md. 165; Cook v. Toumbs, 36 Miss. 685; Hudgin v. Hudgin, 6 Gratt. 320, 52 Am. Dec. 124. See also Scott v. Dunn, 1 D. & B. Eq. 425.

³ Chapman v. Brooklyn, 40 N. Y. 372; Schwinger v. Hickok, 53 N. Y. 280; Henderson v. Overton, 2 Yerg. 394, 24 Am. Dec. 492. The principle upon which these cases profess to proceed is, that a party may recover moneys paid where there is a total failure of consideration. This principle is sufficiently supported by the authorities (*Moses v. McFarlane*, 2 Burr. 1009; *Rheel v. Hices*, 25 N. Y. 289; *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516), but we doubt its applicability to execution sales.

is not a party, the plaintiff may, after purchasing at a sale under such foreclosure, if the homestead was subject to the mortgage, maintain a second suit to foreclose it, and thereby effectively enforce it against the wife.¹

In Kentucky, Missouri, Indiana, Illinois and Texas, if the defendant in execution had no title, he may be compelled, by proceedings in equity, to reimburse the purchaser for the amount contributed by means of the purchase, to the satisfaction of the judgment.² But we think the better rule is that, unless proceeding upon the ground of fraud or misrepresentation, or some other well known ground, a purchaser at an execution sale cannot, by any independent action, recover of either of the parties the amount of his bid.³ Such an action is, necessarily, founded upon a mistake of law. The purchaser is sure to base his claim upon the fact that he mistook the legal effect of the proceedings in the case, or of the defendant's muniments of title. And it is well known that a mistake of law is not a sufficient foundation for relief at law or in equity. The rule of *caveat emptor* unquestionably applies to execution sales; and we know not how this rule can co-exist with another rule requiring one of the parties to indemnify the purchaser in the event of a failure of the title. In a few of the States purchasers have

¹ Brackett v. Banegas, 116 Cal. 278, 58 Am. St. Rep. 164.

² McGhee v. Ellis, 4 Litt. 245, 16 Am. Dec. 124; Muir v. Craig, 3 Blackf. 293, 25 Am. Dec. 111; Warner v. Helm, 1 Gilm. 220; Price v. Boyd, 1 Dana, 436; Hawkins v. Miller, 26 Ind. 173; Preston v. Harrison, 9 Ind. 1; Jones v. Henry, 3 Litt. 435; Dunn v. Frazier, 8 Blackf. 432; Pennington v. Clifton, 10 Ind. 172; Richmond v. Marston, 15 Ind. 134; Julian v. Bell, 26 Ind. 220, 89 Am. Dec. 460; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Arnold v. Cord, 16 Ind. 177; Taylor v. Connor, 7 Ind. 115; Wilchinsky v. Cavender, 72 Mo. 192; Burns v. Ledbetter, 56 Tex. 282; Reed v. Crosthwait, 6 Iowa, 219, 71 Am. Dec. 406.

³ Branham v. San Jose, 24 Cal. 585; Boggs v. Hargrave, 16 Cal. 559, 76 Am. Dec. 561; Salmond v. Price, 13 Ohio, 368; 42 Am. Dec. 204; Laws v. Thompson, 4 Jones, 104; Halcombe v. Loudermilk, 3 Jones, 491; The Monte Allegre, 9 Wheat. 616; Burns v. Hamilton, 33 Ala. 210; Lewark v. Carter, 117 Ind. 206, 10 Am. St. Rep. 40.

been given a statutory remedy.¹ The purchaser at a void execution sale may, by the payment of his bid, wholly or partly discharge some lien or claim on the property purchased. The question then arising is this: Has he the right to hold the property until the amount thus paid is refunded to him? The consideration of this question is reserved for a subsequent section.²

§ 49a. **Of the Right of the Purchaser to Retain the Property Until Repaid the Amount of His Bid.**—Where relief is sought against a void or voidable sale by motion in the court under whose order or process it was made, or by independent suit in equity, the court may doubtless refuse to grant relief unless the complainant or moving party will do equity, and therefore, if the proceeds of the sale were received by him or his predecessor in interest, or were applied to discharge some valid lien or claim against the property, he may be required to reimburse the purchaser as a condition precedent to the setting aside of the sale or the granting of the other relief sought.³ This involves no more than a proper application of the familiar maxim that he who seeks equity must do equity. When, on the other hand, no relief is sought by suit or motion, but a party in whom the legal title remains because the sale was void, seeks to recover possession of the property by an action at law, it is difficult to understand how this maxim of equity can be made available for the protection of the purchaser, unless he, by a cross-bill or complaint, where the court is authorized to exercise jurisdiction in equity, invokes that jurisdiction, and, in effect, demands that the plaintiff be enjoined from proceeding until equity is done. Neverthe-

¹ C. C. P. of Cal., sec. 708; Halcombe v. Loudermilk, 3 Jones, 491; Chambers v. Cochran, 18 Iowa, 160.

² See secs. 51-53.

³ Nivel v. Carson, 47 Ark. 421; Fisher v. Bush, 133 Ind. 315; Brown v. Lane, 19 Tex. 205; Morton v. Welborn, 21 Tex. 773; Herndon v. Rice, 21 Tex. 457.

less, we understand the decisions in several of the States to affirm that a defendant in an action of ejectment may show in his defense that he purchased the property at an execution or judicial sale, or that the amount of his bid was applied to the extinction of some valid claim or lien, and such showing being made, the court will not render judgment for possession, though the sale was void, until the purchaser has been reimbursed the amount so paid.¹ It is not within the power either of the courts or of the legislature to validate void sales unless the judgment debtor within a time specified pays the purchaser the amount of his bid and interest and his costs in defending his title. A statute of New York undertaking to do this was declared unconstitutional and void on the ground that the pre-existing laws were sufficient to afford the purchaser every reasonable remedy to which he had any equitable claim, and that it is not "competent for the legislature to deny for any cause to a party who has been illegally deprived of his property access to the constitutional courts of the State for relief."²

§ 50. **Ratification of Void Sales by the Acts of the Parties in Interest.**—As a general rule, a confirmation or ratification cannot strengthen a void estate. "For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law."³ If this rule be one of universal application, then there can be no necessity for considering the question of ratification in connection with void judicial sales. But this is one of those rules which

¹ *Robertson v. Bradford*, 73 Ala. 116; *Meher v. Cole*, 50 Ark. 361. 7 Am. St. Rep. 101; *Wilmore v. Stetler*, 137 Ind. 127, 45 Am. St. Rep. 169; *Dufour v. Camfranc*, 11 Mart. 615, 13 Am. Dec. 360; *Schafer v. Causey*, 76 Mo. 365; *Howard v. North*, 5 Tex. 296, 51 Am. Dec. 789; *Johnson v. Caldwell*, 38 Tex. 218; *Northcraft v. Oliver*, 74 Tex. 162; *Kendrick v. Wheeler*, 85 Tex. 247; *Halsey v. Jones*, 86 Tex. 488; *Davis v. Gaines*, 104 U. S. 386.

² *Gilman v. Tucker*, 128 N. Y. 190, 26 Am. St. Rep. 464.

³ *Bouvier's Law Dic.*, title "Confirmation."

are so limited by exceptions, that the circumstances to which it may be applied are scarcely more numerous than those from which its application must be withheld. There can now be scarcely any doubt that void judicial sales are within the exceptions, and are unaffected by the rule.¹ These sales may be ratified either directly or by a course of conduct which estops the party from denying their validity. Thus, if the defendant in execution, after a void sale of his property has been made, claims and receives the surplus proceeds of the sale, with a full knowledge of his rights, his act must thereafter be treated as an irrevocable confirmation of the sale.² In a case decided in Pennsylvania, a judgment was recovered against the administrator of an estate. The heirs of the decedent were not parties to the action in which this judgment was recovered, and were, therefore, under the laws of that State, unaffected by it. Under this judgment, writs were issued, and lands of the decedents levied upon, condemned and sold. They produced funds more than sufficient to satisfy the judgment. The surplus was paid to the heirs. One of the daughters having brought ejectment for the lands the supreme court, in discussing and determining her rights, said: "She was perfectly acquainted with the *fact* that she had not been served with process to make her a party to the judgment on which the sale was made, and that she had not voluntarily made herself a party to that proceeding without process; and there is no evidence to repel the presumption that she

¹ *Maple v. Kussart*, 53 Pa. St. 348, 91 Am. Dec. 214; *Johnson v. Fritz*, 44 Pa. St. 449; *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460; *Pursley v. Hays*, 17 Iowa, 310; *Johnson v. Cooper*, 56 Miss. 608.

² *Stroble v. Smith*, 8 Watts, 280; *Herden v. Oubre*, 2 La. Ann. 142; *Sittig v. Morgan*, 5 La. Ann. 574; *McLeod v. Johnson*, 28 Miss. 374; *Southard v. Perry*, 21 Iowa, 488, 89 Am. Dec. 587; *State v. Stanley*, 14 Ind. 409; *Crowell v. McConkey*, 5 Pa. St. 168; *Huffman v. Gaines*, 47 Ark. 227; *Fallon v. Worthington*, 13 Colo. 559, 16 Am. St. Rep. 231; *Hazel v. Lyden*, 51 Kan. 233, 37 Am. St. Rep. 273; *Brewer v. Nash*, 16 R. I. 488, 27 Am. St. Rep. 749.

was equally well acquainted with the rules of *law* which entitled her to disregard a sale made under such a judgment, as having no operation whatever upon her rights, unless she did some act which, on principles of equity and common honesty, might estop her from impeaching it. As she was not a defendant in the execution she had no right, in that character, to receive any part of the money, after payment of the creditor's claim. Her only title to the money depended upon the effect of the proceedings in divesting her estate in the land, and converting it into money, by passing her title to the purchasers. Upon this ground alone could she make any claim to the money, in law or equity. The receipt of her share of the money was, therefore, an affirmation that her title had passed to the purchasers by virtue of the sheriff's sale; and she cannot be received to make a contrary allegation now, to the injury of those who paid their money on the faith of the conveyance. Where a sale is made of land, no one can be permitted to receive both the money and the land. Even if the vendor possessed no title whatever at the time of the sale, the estoppel would operate upon a title subsequently acquired. It was held by this court, at the late sitting in Harrisburg, that 'equitable estoppels of this character apply to infants as well as adults, to insolvent trustees and guardians as well as persons acting for themselves, and have place as well, where the proceeds arise from a sale *by authority of law*, as where they spring from *the act of the party*.'¹ The application of this principle does not depend upon any supposed distinction between a void and voidable

¹ Commonwealth v. Shuman's Admr., 6 Harr. 346; McPherson v. Cunliff, 11 S. & R. 426, 14 Am. Dec. 642; Wilson v. Bigger, 7 W. & S. 111; Stroble v. Smith, 8 Watts, 280; Benedict v. Montgomery, 7 W. & S. 238, 43 Am. Dec. 230; Martin v. Ives, 17 Serg. & R. 364; Crowell v. McConkey, 5 Barr, 168; Hamilton v. Hamilton, 4 Barr, 193; Dean v. Connelly, 6 Barr, 239; Robinson v. Justice, 2 Pa. Rep. 19, 21 Am. Dec. 407; Share v. Anderson, 7 Serg. & R. 48, 10 Am. Dec. 421; Furness v. Ewing, 2 Barr, 479; Adlum v. Yard, 1 Rawle, 163, 18 Am. Dec. 608.

sale. The receipt of the money, with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience, and, therefore, binds the right of the party in one case as well as the other."¹ Perhaps it is not essential that the defendant in execution should have directly received any part of the proceeds of the sale. If he knows of the sale, makes no objections thereto, and permits the proceeds to be applied to the payment of his debts, he will, at least in Pennsylvania, be precluded from denying its validity.² The same principle should be applied to one who actively participates in a sale, as by being one of the bidders and making no claim at the time of the sale that it was irregular or unauthorized.³

If lands are sold at a partition or other chancery sale, no co-tenant, who has claimed and received his share of the proceeds, can deny the validity of the petition. He cannot be allowed to retain the money and regain the land.⁴ The same principle applies to sales made by guardians, administrators and executors. A ward or heir may elect to affirm a void sale, and thus entitle himself to the proceeds.⁵ When a valid election is once made it cannot be revoked. The ratification by a ward or heir of a sale, made by an administrator or guardian, may be made also by receiving the proceeds of the sale.⁶ Of course, this ratification cannot

¹ *Smith v. Warden*, 19 Pa. St. 429.

² *Spragg v. Sbriver*, 25 Pa. St. 281, 64 Am. Dec. 698; *Mitchell v. Freedley*, 10 Pa. St. 208; *Maple v. Kussart*, 53 Pa. St. 352, 91 Am. Dec. 214; *Willard v. Willard*, 56 Pa. St. 128.

³ *Mock v. Stuckey*, 86 Ga. 187.

⁴ *Tooley v. Gridley*, 3 S. & M. 493, 51 Am. Dec. 628; *Merritt v. Horne*, 5 Ohio St. 307, 67 Am. Dec. 298.

⁵ *Jennings v. Kee*, 5 Ind. 257.

⁶ *Ib.*; *Lee v. Gardner*, 26 Miss. 521; *Pursely v. Hays*, 17 Iowa, 310; *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460; *Wilson v. Bigger*, 7 W. & S. 111; *Handy v. Noonan*, 51 Miss. 166; *Parmelee v. McGinty*, 52 Miss. 475; *Walker v. Mulvean*, 76 Ill. 18; *Corwin v. Shoup*, 76 Ill. 246; *Bump v. Gard*, 107 Ind. 573; *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101; *Wilmore v. Stetler*, 137 Ind. 127, 45 Am. St. Rep. 169.

be accomplished through the action of a minor, or of any person not competent to act for himself.¹ If the person whose estate was sold, though he does not directly receive the proceeds of the sale, is benefited thereby, as where they are applied to the extinction of some lien or other enforceable claim, the mere fact of such benefit does not amount to a ratification, but it entitles the purchaser to compel the person entitled to avoid the sale to exercise his right to elect either to ratify or to rescind. Speaking of the relation of heirs to a purchaser at a judicial sale, the Supreme Court of Alabama said: "Regarding the proceedings in the probate court as void at law for the reasons stated, what, we may inquire, were the equitable rights, if any, acquired under it by the purchaser? This question has been fully settled by our past decisions. Where land of a decedent is sold by the probate court for the payment of debts, or for distribution, and the proceeding is void for want of jurisdiction, or otherwise, and the purchase money, being paid to the administrator, is applied by him to the payment of the debts of the decedent's estate, or is distributed to the heirs, while the sale is so far void as to convey no title at law, the purchaser nevertheless acquires an equitable title to the lands, which will be recognized in a court of equity. And he may resort to a court of equity to compel the heirs or devisees to elect a ratification or rescission of the contract of purchase. It is deemed unconscionable that the heirs or devisees should reap the fruits of the purchaser's payment of money appropriated to the discharge of debts, which were a charge on the lands, and at the same time recover the lands. They are estopped to deny the validity of the sale, and at the same time enjoy the benefits derived from the appropriation of the purchase money. And this principle applies to minors as well as

¹ A *feme covert* may affirm a void sale by receiving the proceeds. *Kempe v. Pintard*, 32 Miss. 324.

adults.¹ If the person whose property was sold be a minor, he cannot ratify the sale until after he becomes of lawful age. Nor can anyone ratify for him during his minority. No act done or sanctioned by his guardian can bind him as a ratification; nor will he be held to affirm the sale merely on the ground that, during his minority, the proceeds were applied to his use or for his benefit,² nor because such proceeds were accounted for by the administrator in his settlements with the estate, no part being paid over to the heir.³ In Missouri and Wisconsin, the receipt of the proceeds of a guardian's sale by a minor after coming of age, or by a lunatic after becoming sane, does not operate as an affirmation of the sale.⁴ The hardship of this rule is very materially ameliorated, in the States named, by the adoption of another rule, under which a *bona fide* purchaser of lands sold at a void judicial sale is entitled to retain, in many cases, a charge or lien on the property, for the amount paid by him. We are unable to understand why one whose lands were sold while he was an infant should not be bound by acts done after attaining his majority to the same extent as any other adult, and hence believe that the better opinion is that his receipt of the proceeds of the sale must be regarded as a ratification.⁵ In Indiana, though the sale of the property of an infant is void, because the court was without jurisdiction to appoint the guardian, still, if the purchaser pays for the land in good faith, and the guardian, under the direction of the court, invests the proceeds of the sale in other lands in the name of the ward, the purchaser will be protected.⁶

It is essential to every valid ratification that the ratify-

¹ Woodstock I. Co. v. Fullenwider, 87 Ala. 584, 13 Am. St. Rep. 73.

² Rèqua v. Holmes, 26 N. Y. 338; Wilkinson v. Filby, 24 Wis. 441; Longworth v. Goforth, Wright, 192.

³ Townsend v. Tallent, 33 Cal. 45, 91 Am. Dec. 617.

⁴ Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566; Mohr v. Tulip, 40 Wis. 66.

⁵ Smith v. Gray, 116 N. Car. 311.

⁶ Decker v. Fessler, 146 Ind. 16.

ing acts were done with a full knowledge of the facts constituting the transaction to be ratified,¹ and that the proceeds of the benefit of the act be retained after such knowledge.²

§ 50a. **Estoppel to Question the Validity of a Sale.**—He whose property is sold may be estopped from questioning the validity of a sale by facts occurring either before or after it was made. He is to the same extent as other persons bound to act with reasonable diligence and in good faith, and if he, either by his action or unreasonable inaction, causes one to change his position to his prejudice, an estoppel may arise in favor of the latter adequate for his protection. Thus, though property was exempt from execution, the conduct or laches of the defendant may be such as to estop him from urging his right of exemption against the purchaser.³ Though the levy was not sufficient to support the sale, yet the defendant may, by his express or implied waiver or by other act or acquiescence, estop himself from resisting on that account title based thereon.⁴ Though the property sold by an administrator was a homestead, and as such not subject to the jurisdiction of the court, or, at all events, was such that the court had no right to direct its sale, yet if such administrator, being the party entitled to the homestead, applied for an order authorizing its sale, and in his official capacity received the purchase price, both he and his successors in interest are estopped from denying the validity of the sale.⁵ The sale of lands by an administrator in which he has a personal interest ought not to be made by him to one who, from the petition for the sale and the other proceedings in the estate, believes and is justified

¹ *Dolargue v. Cress*, 71 Ill. 380; *Smith v. Tracy*, 36 N. Y. 79.

² *McDowell v. McKenzie*, 65 Ga. 630; *Wallace v. Sawyer*, 90 Ind. 499.

³ *Freeman on Executions*, secs. 212a and 214a.

⁴ *Freeman on Executions*, sec. 260; *Taffits v. Manlove*, 14 Cal. 50, 73 Am. Dec. 610; *Corniff v. Cook*, 95 Ga. 61, 51 Am. St. Rep. 55.

⁵ *Ions v. Harbison*, 112 Cal. 260.

in believing that the administrator makes no claim thereto, and he is estopped, after such sale, from asserting any title against the purchaser, though such title must have been apparent from an inspection of the public records.¹ There is no doubt that one who permits his property to be sold as the property of another and who fails to disclose his interest may be estopped by his conduct from subsequently asserting it,² and we see no reason why this principle is less applicable to execution and judicial than to other sales. Though the property belongs to the defendant there may be defects in the judgment, execution, or other proceedings rendering them insufficient for the transfer of his title. It may be that he is not under any active obligation to be present at the sale, or, if present, to there disclose or call attention of the purchasers to such defects, but his apparent acquiescence in the sale, evidenced by his then delivering the property to the purchaser without objection, will, in some of the States, be held to operate as an estoppel against his subsequent recovery of the property on account of defects in the writ,³ and his active participation in a sale must generally be regarded as indicating his consent thereto, or as an implied representation that he knows of no reason why the sale should not be made, and he has generally been held to be estopped from changing his attitude as against persons who have relied thereon. In speaking of the conduct of certain administrators and their subsequent attempt to avoid a sale, the Supreme Court of Florida very forcibly said: "The administrators *de bonis non* were assisting at and encouraging and aiding this sale. The property sold, according to testimony, at its fair value. Can, now, any reasonable person arrive at any other conclusion than that the condition of the purchaser or purchasers was or were

¹ Lindsay v. Cooper, 94 Ala. 170, 33 Am. St. Rep. 105.

² Karns v. Olney, 80 Cal. 90, 13 Am. St. Rep. 101.

³ Rawles v. Jackson, 104 Ga. 593, 69 Am. St. Rep. 185.

changed by this conduct? Suppose these administrators by themselves or their attorney, with their assent, had said: this property has been wrongfully levied; it is the property of the administrators *de bonis non* of Parkhill, deceased; it has been levied upon as the property of the administrators whose letters have been revoked. The judgment is void. The execution is void. The whole matter is illegal, and purchasers will buy at their peril. Would the property, under such circumstances, have brought fair value? Would Ponder, who is represented as a prudent, cautious man, have become a purchaser? Was not, in fine, a belief induced by the conduct of these administrators, which caused the purchaser, Ponder, to change his previous position? If so (and so we think), then, by the law of estoppel, they are concluded from averring against Ponder a different state of things existing at the same time.”¹

The parties to be affected by the sale may also be estopped from denying its validity by their action, and, perhaps, by their inaction at a subsequent time. This subject, or at least one branch of it, has been referred to in the preceding section considering when a sale is in law deemed ratified or confirmed by a party who otherwise would be entitled to question it. It was there shown that such ratification was conclusively implied from the receipt, with knowledge of the facts, of the proceeds of the sale. Many of the decisions, instead of calling this a ratification, speak of it as producing an estoppel precluding any person, not under any disability, receiving the proceeds of the sale or any part thereof from questioning its validity, if such proceeds were received and retained with knowledge of the fact on account of which the sale was subject to successful assault. The rule is applicable, though the judgment under which the sale was made is void for want of jurisdiction, and it is not material whether the defect in jurisdiction related to the

¹ Ponder v. Moseley, 2 Fla. 207, 48 Am. St. Dec. 194.

subject-matter of the proceeding or the persons against whom it was prosecuted. "It is a familiar principle of the law that a party accepting and retaining the fruits of a void judgment is estopped from assailing the judgment itself.¹ In none of the cases cited, however, did it become necessary to determine the effect of receiving the benefits of a judgment void for the want of jurisdiction in the court over the subject-matter of the suit, although the language used in some of the opinions is broad enough to cover such cases. In the case at bar the court below, in some of the instructions given to the jury, seems to have drawn a distinction between the case of a party accepting the fruits of a judgment rendered by a court without jurisdiction of the subject-matter, and a case in which the party has received the fruits of a judgment voidable for want of jurisdiction over the person, or on account of some informality occurring in the proceedings antecedent to the judgment; but this theory is expressly waived by counsel for appellee in their argument filed in this court, and after diligent search I have been unable to find any authority in support of the theory of the trial court. Nothing in the testimony indicates that, at the time the appellant paid and the appellee received the amount of the judgment of the county court, either party entertained a suspicion of the invalidity of such judgment; and, under these circumstances, we must presume that both parties were acting in good faith, under the belief that the proceedings in that court were valid and binding, and that the judgment there rendered had all the force and effect of a valid judgment, and that the money was paid and the land taken with this understanding. And as appellee, after the notice of the invalidity of such proceeding, continued to retain the money so paid, I am of the opinion that he is

¹ *Kite v. Town of Yellowbead*, 80 Ill. 208; *Town v. Town of Blackberry*, 29 Ill. 137; *Felch v. Gilman*, 22 Vt. 39; *Embury v. Connor*, 3 N. Y. 511, 53 Am. Dec. 235; *Hitchcock v. Danbury, etc., R. R. Co.*, 25 Conn. 516.

estopped from denying the validity of such judgment, and that he should be held bound by that adjudication to the same extent as he would have been had the court had complete jurisdiction, and that, for the purposes of this action, the same should be treated in all respects as a valid judgment.”¹

The rule or principle to which we have referred is especially applicable to the sale of the property of decedents and the receipt by heirs of the proceeds of such sales or some part thereof.² By this statement we by no means imply that the principle is not also applicable to sales under execution,³ and to guardians’ and other judicial sales.⁴ With respect to adults, we think it not essential to the creation of an estoppel against them that the proceeds of the sale be actually received by them. If an administrator, after making a sale, receives the purchase price and charges himself therewith in his accounts, and thereby the heirs receive the benefit, either in the augmenting of the shares which are ultimately paid to them, or in the discharge of liabilities otherwise enforceable against them or their shares, they have substantially received the proceeds of the sale, and, while retaining the benefit which has thus accrued to them, are estopped from avoiding the sale.⁵

When a sale is made of the property of minors, whether by their guardian or by the executor or administrator of

¹ *Denver City, etc., Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234.

² *Wilson v. Holt*, 83 Ala. 528, 3 Am. St. Rep. 768; *Oden v. Dupuy*, 93 Ala. 39; *Roberts v. Lindley*, 121 Ind. 56; *Palmerton v. Hoop*, 131 Ind. 23; *Wilmore v. Stetler*, 137 Ind. 127, 45 Am. St. Rep. 169; *Axton v. Carter*, 147 Ind. 672; *Cameron v. Coy*, 165 Pa. 290; *Sager v. Mead*, 171 Pa. 349; *Lewis v. Lichty*, 3 Wash. 213, 28 Am. St. Rep. 25.

³ *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460; *France v. Haynes*, 67 Iowa, 139.

⁴ *Hoffmire v. Holcomb*, 17 Kan. 378.

⁵ *Bell v. Craig*, 52 Ala. 215; *Jones v. Woodstock I. Co.*, 95 Ala. 551; *Oden v. Dupuy*, 99 Ala. 36.

their ancestor, the decisions are not entirely harmonious respecting the circumstances creating an estoppel against their avoiding or disregarding the sale. Of course, they are not estopped from the mere fact that they were represented in the proceeding, either by their guardian *ad litem* or general guardian;¹ nor from the mere use of some part of the proceeds for their benefit, especially where such use was by their guardian, who is also their father, and in the latter capacity under the duty of furnishing them means of procuring their education and support.² We have cited decisions in the preceding section showing that their receipt of the proceeds of the sale, after attaining their majority, is not a ratification of it by them, but we believe this opinion to be neither reasonable nor sustained by the weight of authority, and we doubt not that they are estopped by such receipt.³ In the absence of the direct receipt of such proceeds they may have had the benefit thereof, either through an accounting by the administrator or guardian making the sale, or by the use of the proceeds in their support or education. If a sale is made to or for the benefit of an administrator or guardian, probably the fact that he has charged himself in his account with the proceeds of the sale does not create any estoppel in his favor which will enable him to resist proceedings by the heirs or other minors for the recovery of the property.⁴ Perhaps the weight of authority supports the denial of the existence of any estoppel against minors on account of the use for their support, or the other application for their benefit, of the proceeds of a sale which, as against them, was void when made;⁵ but we prefer those

¹ Ream v. Wolls, 61 Ohio St. 131.

² Foley v. Mutual L. I. Co., 138 N. Y. 333, 34 Am. St. Rep. 436.

³ Terrell v. Weymouth, 32 Fla. 255, 37 Am. St. Rep. 94; Wilmore v. Stetler, 137 Ind. 127, 45 Am. St. Rep. 169; Kingsley v. Jordan, 85 Me. 137; Tracy v. Roberts, 88 Me. 310, 51 Am. St. Rep. 394.

⁴ Sweeney v. Warren, 127 N. Y. 526, 24 Am. St. Rep. 468.

⁵ Rowe v. Griffith, 57 Neb. 488; Bachelor v. Korb, 58 Neb. 122, 76 Am. St. Rep. 70; Wilkinson v. Filby, 24 Wis. 441.

decisions which affirm that, under such circumstances, the equity of the purchaser is superior to that of the minors.¹ If the proceeds of the sale of property of infants is invested in other property, the title of which is taken in their names, or such proceeds are otherwise held for them or as a part of their estate, they are not entitled to retain the property thus acquired, and at the same time to repudiate the sale to which its acquisition was due. Conceding that they are entitled to elect whether they will permit the original sale to stand, they cannot recover the property until the election is made, and the courts may exercise the right of election for them and determine that they shall not rescind, but shall be bound by the sale, though, when made, it was, as against them, void.² Though the proceeds of a void sale are not actually received, yet if a person has an election either to waive or to ratify the sale, and he does some act manifesting his election to ratify it, the ratification is irrevocable, and he is estopped from subsequently questioning the sale, as where he attempts by suit to recover his share of such proceeds.³

It may happen that some of the persons affected by a sale are estopped to dispute its validity and others not, or that the same person may be bound by an estoppel in one capacity and free from it in another. Thus, if an administrator, executor, or guardian makes a void or unauthorized sale of property, it may be that those whom he represents are not bound thereby, but if he has an interest in the property as heir or devisee, or claims some title independent of, and paramount to, that of the ward or decedent represented by him, still, if in the proceedings culminated in a sale and a deed apparently made pursuant thereto, he has manifestly

¹ *Milner v. Vandivere*, 86 Ga. 540.

² *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Commonwealth v. Sherman's Admr.*, 18 Pa. St. 343. See also *Jacoby v. McMahon*, 174 Pa.

⁴ 133.

³ *Lathrop v. Doty*, 82 Iowa. 272.

dealt with the property as that of his ward or decedent, and is estopped in his capacity as heir, or devisee, or claimant of an adverse or independent title, from asserting either that the deed so executed by him is unavailing, or that it failed to convey the title in fee simple.¹

We apprehend, where the sale is void, the owner of the property sold is entitled to maintain an action for its recovery at any time within the period specified in the statute of limitations applicable in his State to an action of the class which he brings, and that the failure to bring it, if not prolonged beyond that period, is not sufficient evidence of a ratification of a sale, nor does it create any estoppel against the prosecution of the suit. Nevertheless, there are many decisions in which long delay has been taken into consideration, especially where the property has been permitted to pass into the hands of strangers to the original sale.² Mere acquiescence or inaction is sometimes spoken of as creating an estoppel against the assertion of a right to recover property which has been the subject of a void sale,³ especially when the inaction continued for several years,⁴ but we are of the opinion that when no benefit accrues to one from a sale, and he is not otherwise estopped from assailing it, he may safely take the time allowed by the statute of limitations.⁵ If, on the other hand, the sale is not void, but voidable only, at the election of an heir or other person affected by it, he must exercise his right of election within a reasonable time; otherwise he is presumed to have

¹ *Lindsay v. Cooper*, 94 Ala. 170, 33 Am. St. Rep. 105; *Wells v. Steckelberg*, 52 Neb. 597, 66 Am. St. Rep. 529; *Arlington, S. B. v. Paulsen*, 59 Neb. 94.

² *Benedict v. Bonnot*, 39 La. Ann. 972.

³ *Davie v. Davie* (Ark.), 18 S. W. Rep. 935.

⁴ *Jones v. Woodstock I. Co.*, 95 Ala. 551; *Hazel v. Lyden*, 51 Kan. 233, 37 Am. St. Rep. 273; *Mitchell v. Campbell*, 19 Or. 198; *Adams v. Howard*, 110 N. C. 15; *Holbert v. Carroll* (Tex. Civ. App.), 25 S. W. Rep. 1102.

⁵ *Harrison v. Harrison*, 106 N. C. 282.

ratified the sale, and, if so, his ratification is necessarily irrevocable.¹

§ 51. **Right of Purchasers to be Subrogated to the Lien Discharged, Denied.**—A judicial or execution sale is usually made for the purpose of satisfying some lien or charge on the property sold. After such sale is made, and the amount of the bid paid, the owner of the property, if he can avoid the sale, will not only retain the property which was originally his, but will also have its value enhanced by the amount paid to remove the charge or lien therefrom. According to natural equity, it is clear that the owner ought not to thus profit by the sale, and that the purchaser ought to be subrogated to the rights of the holder of the charge or lien. There is some doubt whether the equity which is, in fact, administered by the courts, enforces, in this case, what we deem to be the dictates of natural equity. In a case decided in Indiana, an execution sale was made under a valid judgment, but the sale itself was inoperative, on account of a non-compliance with the appraisement law. The purchaser, however, claimed that he was entitled in equity to be subrogated to the rights of the judgment creditor. The supreme court, in denying the claim, said: “Can the doctrine of subrogation be applied to the case made by the record? This is the main inquiry in the case. We are not advised by any direct adjudication on the point involved in this question; but there are various authorities to the effect that ‘it is only in cases where the person paying the debt stands in the situation of a surety, or is compelled to pay in order to protect his own interest, or in virtue of legal process, that equity substitutes him in place of the creditor, as a matter of course, without any special agreement. A stranger paying the debt of another will not be subrogated to the creditor’s right, in the absence of an agreement to that effect; payment by such person

¹ *Egan v. Grece*, 79 Mich. 629; *Boyer v. East*, 161 N. Y. 580, 76 Am. St. Rep. 290.

absolutely extinguishes the debt and security.¹ This position being correct, and we think it is, we are unable to perceive any ground upon which the decree, so far as it subrogates the plaintiffs to the rights of the judgment creditor, can be maintained. The position of Marston was that of an ordinary vendee at a sheriff's sale, and nothing more. There is, indeed, nothing in the case in any degree tending to show that the protection of his interest required, or even induced, the purchase. He purchased the land and paid for it voluntarily; we must, therefore, hold that the amount which he paid to the sheriff operated as a discharge, *pro tanto*, of the creditor's judgment; and that judgment being thus satisfied there could be no substitution."² The quotation we have just made very fairly represents the reasoning of those courts, which hold that the purchaser at a void execution or judicial sale cannot be subrogated to the rights of the holder of the lien which his payment has contributed to discharge. It must be confessed that the reasoning is in consonance with the general law of subrogation. This general law affords no encouragement to one person who voluntarily discharges the debt of another. Such a person is styled a volunteer. His acts are without compulsion, and he is, therefore, not classed with those persons who are compelled, as sureties or otherwise, to discharge obligations on which others are primarily responsible. The purchaser at a void judicial sale acts under a mistake of law; and this, as is well known, is rarely, if ever, recognized as sufficient to induce the interposition of courts of equity. Purchasers at void probate sales have also been judged not to be entitled to subrogation to the rights of the creditors whose claims their purchases had discharged,³ but the right of purchasers at void judicial

¹ 1 Leading Cases in Equity, 113, and authorities there cited.

² *Richmond v. Marston*, 15 Ind. 136, 42 Am. Dec. 204.

³ *Chambers v. Jones*, 72 Ill. 279; *Bishop v. O'Connor*, 69 Ill. 431; *Kinney v. Knoebel*, 51 Ill. 112; *Nowler v. Colt*, 1 Ohio, 236, 13 Am. Dec.

sales, whether in probate or chancery, to subrogation, is steadily gaining ground, and is now established by the decided preponderance of authority, as will appear from the following sections.

In truth, we do not know that there is any State in which the application of the doctrine of subrogation to execution or judicial sales would now be wholly denied. We have been unable to discover any case overruling that cited by us from the Supreme Court of Indiana, but the legislature of that State enacted a statute applying the equitable rules of subrogation to both execution and judicial sales.¹ In their subsequent decisions, the courts of that State, however, took pains to declare that the rule is not "dependent upon the statutory law,"² and they repudiated the reason which had been supposed to justify the refusal to grant the right of subrogation by affirming that "the purchaser at an invalid sheriff's sale is not a volunteer. It is the right of a citizen to bid at sheriff's sales, and it is not for the debtor whose debt the purchase money pays to denominate him a volunteer, or to deny his right to make the debt out of the property pledged for its payment. It cannot make any difference to the debtor who gets the property, provided it goes in the discharge of his debt; that is, where he pledges it to go, and there is where equity declares it shall go."³ In Illinois, it is now clear, not only that no relief will be granted to one coming into equity for the purpose of setting aside or avoiding a sale until he repays so much of the proceeds of the sale as have been used to discharge liens or claims against the property,⁴ but also that the doctrine of subrogation is applicable to execution and judicial sales

640; *Salmond v. Price*, 13 Ohio, 368; *Lieb v. Ludlow*, 4 Ohio, 469. The rule in this State has been changed by statute.

¹ *Walton v. Cox*, 67 Ind. 164; *Paxton v. Sterne*, 127 Ind. 289; *Milburn v. Phillips*, 143 Ind. 93, 52 Am. St. Rep. 403.

² *Short v. Sears*, 93 Ind. 505.

³ *Bodkin v. Merit*, 102 Ind. 293.

⁴ *Wickiser v. Cook*, 85 Ill. 68; *Brandon v. Brown*, 106 Ill. 519.

whenever by or through them a lien is discharged.¹ But we understand it to be still denied applicability to probate sales when their proceeds are not applied to pre-existing liens on the property.

We must admit our inability to understand the views of the courts of Michigan upon this subject. In that State, an executor sold, for the purpose of paying debts, decedent's lands of which the devisees had taken possession, and it was held that his action, though supported by an order of sale, was void, on the ground that the statute expressly required, under such circumstances, any balance due from the devisees to be collected by execution.² Afterwards the purchaser sought relief by a suit in equity, in which he, in effect, asked that the amounts paid by him, in so far as they had been applied to the extinction of demands which might, by appropriate proceedings, have been asserted against the property of the devisees, be decreed to be a lien on such property. In denying relief, the supreme court said: "It is difficult to understand on what principle such a claim can be set up. No rule is better settled than that liens can only be created by agreement, or by some fixed rule of law. It is not one of the functions of courts to create them."³ There is no reason for allowing complainants to set up a lien in this case which would not apply with equal force to execution or judicial sales under equitable or probate decrees and orders. But such a doctrine would be a novelty. Every one is bound to satisfy himself of the authority under which a judicial sale is made, and buys at his peril. It would be a contradiction in terms to hold a sale void for want of authority to make it, and yet

¹ *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125; *McHany v. Schenck*, 88 Ill. 357.

² *Atwood v. Frost*, 51 Mich. 360, 59 Mich. 409.

³ *Bennett v. Nichols*, 12 Mich. 22; *Wright v. Ellison*, 1 Wall. 16; *Lyster's Appeal*, 54 Mich. 325; *Perkins v. Perkins*, 16 Mich. 162; *Rowley v. Towsley*, 53 Mich. 329.

valid enough to create a lien for the purchase money. Where individuals sell their own lands and pay for them there can be no want of authority, and the question is only one of title. But a sale made by quitclaim deed, without covenants, and without fraud or misrepresentation, does not entitle the purchaser to reclaim his money. This bill is an attempt, not only to give to a void probate sale the effect of a warranty deed, but to go further and bind the land itself, which was sold without right for its repayment. An executor has no power to dispose of lands by virtue of his office, and no such power was given by Mr. Atwood's will as to any land specifically devised. Whenever he undertakes to meddle with lands without authority, he cannot bind them any more than any stranger. The owner, whether devisee or otherwise, is in no way affected by his action, which is void for all purposes. Heirs or devisees are only bound by what he does legally. It is difficult to see how the case can be affected by the use which the executor made of the money. In all probate sales, valid or invalid, the officer making the sale receives the money and usually appropriates it. But it never has been supposed, and it is not legally true, that such use creates any lien on the premises unlawfully sold. What he receives without lawful authority does not concern the estate, and he can no more create a lien by spending that money than by spending any other. If the estate owes him he must pursue his remedy as the law gives it, and his claim must first be established before he can get any remedy. The use, if made, is not made for the benefit of the particular piece of land that he attempted to sell, but for the whole estate; and if it becomes a claim, it is a claim against the whole estate, and not against a part of it.''¹ When one sees in this quotation the suggestion that the application of the doctrine of subrogation to execution and judicial sales

¹ Frost v. Atwood, 73 Mich. 67, 16 Am. St. Rep. 560.

“would be a novelty,” he finds difficulty in resisting the suspicion that Rip Van Winkle, after his long sleep, tired of the strange scenes and faces in the neighborhood of his boyhood, went west, became interested in law and politics, and rose to the distinction of being called upon to write this opinion.

§ 52. Right of Purchasers at Execution and Chancery Sales to Subrogation, Affirmed.—We pass now to the authorities in conflict with those cited in the preceding section. From these authorities it will be seen that the right of purchasers at void sales, to be subrogated to the claims they have discharged by their payments, is very generally recognized in this country. In Kentucky, a slave named Jack, was sold under execution against an estate, and was purchased by Enos Daniel. The slave was subsequently recovered from Daniel in an action of *detinue*, under a title paramount to that of the decedent. Daniel then commenced a suit in chancery to be subrogated to the rights of the holder of the judgment under which the sale had been made. The case was, therefore, one in which the title had failed, not from any defect in the sale or judgment, but because the defendant in execution was not the owner of the property. The court, nevertheless, sustained the claim for subrogation, saying: “Admitting that Enos Daniel knew that Jack belonged to Mary McLaughlin, and was not subject to execution against the estate, this, in our judgment, presents no legal impediment to his claim upon the estate for the amount of Clark’s demand paid by him. The slave was sold as the property of the estate, under the process of law; he purchased him, and by his purchase and execution of a sale-bond to Clark he satisfied and extinguished that amount against the estate and for which it stood responsible. And according to the principle repeatedly .. recognized in this court, he has an equitable right to be substituted in place of the creditor, and to have the amount

so paid refunded to him out of the estate. His equity rests, not upon the ground of his want of knowledge as to the title of the slave, but on the ground of his having discharged a judgment against the estate, for which it stood chargeable, by a purchase of property made under the coercive process of the law; and, therefore, has equitable right to be reimbursed out of the estate.”¹ In South Carolina, a plaintiff, at his own sale, purchased the interest of the defendant in certain personal property. There were older writs in the hands of the officer making the sale, and the proceeds were exclusively applied to those writs. The sale turned out to be void. The plaintiff’s judgment was subsequently paid; but he was not repaid the purchase money, which had been applied to the extinction of elder claims. In these circumstances it was held that his “claim is that of a junior creditor, who has paid prior debts, and he must be substituted in the place of the senior creditors, and subrogated to all their rights.”² In Louisiana and Texas, if an execution sale is void for some irregularity of proceeding, but is made under a valid judgment, and the proceeds of the sale are applied to the satisfaction of the judgment, the defendant cannot recover the property from the purchaser without first repaying the amount paid at the sale.³ This rule may not in all cases be just, for there may be instances in which the value of the property claimed greatly exceeds the amount for which it was sold at an invalid execution sale, and the owner may, nevertheless, not be able, while out of possession of his property, and especially while his right thereto is not established, to raise moneys with which to repay the sum paid by the purchaser. If, however, by the

¹ *McLaughlin v. Daniel*, 8 Dana, 183.

² *Bentley v. Long*, 1 Strob. Eq. 52, 47 Am. Dec. 523.

³ *Howard v. North*, 5 Tex. 316, 51 Am. Dec. 769; *Dufour v. Camfranc*, 11 Mart. 610, 13 Am. Dec. 360. To the same effect, *Short v. Sears*, 93 Ind. 505; *McGee v. Wallis*, 57 Miss. 638; *Freeman on Executions*, sec. 352.

judgment, or by levy of the writ or otherwise, a lien existed against the property sold under execution, it is entirely equitable to require the owner to reimburse the purchaser to the extent to which by his purchase he released the lien, and on the owner's failure to do so to subrogate the purchaser to the lien, and to permit him to enforce it; and this principle is as applicable to execution as to any class of judicial sales.¹ If, in the attempted assertion of an execution, it is necessary that the judgment creditor discharge some pre-existing lien, as where the statute requires, as a condition precedent to a levy on mortgaged chattels, that the execution creditor pay the mortgage debt, he is, though his execution lien subsequently proves unavailing, and his title to the chattels so far as based thereon ineffective, entitled to be subrogated to the lien of the mortgage which he has thus satisfied.²

When a void sale is made under proceedings to foreclose a mortgage, there seems to be no doubt that the purchaser succeeds to the title and rights of the mortgagee, and may enforce them as the mortgagee could have done, but for the sale.³ There is no reason why the rule should be specially applicable to foreclosure sales, unless it be the fact that they are based upon some lien, which is by them either wholly or partly satisfied, and to which it is clear the purchaser may equitably be subrogated. Every other chancery sale may give rise to a claim which, if not similar, is at least equally potent with equitable considerations, and

¹ *Short v. Sears*, 93 Ind. 505; *Cosgrove v. Merz* (R. 1.), 37 Atl. Rep. 704; *Jones v. Smith*, 55 Tex. 383; *Davis v. Gaines*, 104 U. S. 886.

² *Moore v. Calvert*, 8 Okla. 358, 58 Pac. Rep. 627.

³ *Brown v. Brown*, 73 Iowa, 430; *Brobst v. Brock*, 10 Wall. 519; *Jackson v. Bowen*, 7 Cow. 13; *Gilbert v. Cooley*, Walker's Ch. 494; *Lilli-bridge v. Tregent*, 30 Mich. 105; *Jordan v. Sayre*, 29 Fla. 100; *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125; *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613; *Bailey v. Bailey*, 41 S. C. 337, 44 Am. St. Rep. 113; *Givens v. Carroll*, 40 S. C. 413, 42 Am. St. Rep. 889; *Hull v. Hull*, 35 W. Va. 155, 29 Am. St. Rep. 800.

where such is the case the doctrine of subrogation is not less applicable than to foreclosure sales. Hence, if property is sold in a suit in partition and the proceeds of the sale reach the co-tenants, they will not be granted relief against it though they were infants and the court had no jurisdiction over their persons, except upon the condition of refunding so much of such proceeds as may have come into their hands.¹ On the same principle, if the property of a corporation is directed to be sold and is sold by a receiver, and the proceeds applied to the payment of its obligations, the purchaser, or his successor in interest, if the receiver's sale is adjudged to be void, is entitled to be subrogated to the right of the creditors whose claims have been satisfied by the proceeds of the sale.² A like remedy is available to one who purchases property at a void trustee's sale under a trust deed made by a corporation, if the proceeds of the sale are applied to the satisfaction of its liabilities.³

§ 53. **Right to Subrogation Affirmed in Favor of Purchasers at Probate Sales.**—The cases in which the equitable rule of subrogation has been most frequently invoked with success, have arisen under sales made by administrators, executors and guardians. Thus, in North Carolina, a bill in equity was filed, showing that a sale of lands had been made to plaintiff by the defendant, as executor; that in a trial at law the sale had been declared void for want of authority in the executor to sell; that the purchase money had been paid to the defendant; that \$108 of this money remained in the hands of the executor, and the balance thereof had been applied to the payment of the debts of the testator. The bill prayed that the \$108 be refunded, and that as to the balance of the purchase money the plaintiff might stand in the place of the creditors whose claims it

¹ Chambers v. Jones, 72 Ill. 275.

² Mining Co. v. Mining Co., 116 Ill. 170.

³ Hart v. Brown, 77 Ill. 226; Bonner v. Lepley, 61 Miss. 392.

had satisfied, and that the land be sold for the payment thereof. The following is from the opinion of the court: "The claim of the plaintiffs to be substituted to the creditors, whose demands they have satisfied, is supported, we think, by well settled principles. By the laws of this State, real as well as personal property is liable for debts of every description; but personal property is the primary fund for their satisfaction. It is alleged that the personal assets were insufficient for the discharge of all the debts. Whether this be the fact or not, can only be ascertained by taking an account of the assets and of the administration of them. If, in taking the account, the fact should be established as alleged, then it follows, from the doctrine sanctioned in the cases of *Williams v. Williams*,¹ and *Saunders v. Saunders*,² that the defendant Dunn would have a right in a court of equity to be subrogated to those creditors who have been paid by his advances. As between Dunn and the plaintiff, if their money were yet in his hands he could not retain it with a safe conscience, and would be obliged to refund it. And it seems to us clear, that if he could rightfully reclaim it from his co-defendants, he might be compelled to assert this right, or permit the plaintiffs to assert it in his name, in order that it might be refunded. The court would do this upon the same principle by which the surety, on making satisfaction to the creditor, becomes entitled to demand every means of enforcing payment which the creditor himself had against the principal debtor; a principle which, when traced to its origin, is founded on the plain obligations of humanity, which bind every one to furnish to another those aids to escape from loss which he can part with without injury to himself. * * * The doctrine of substitution, which prevails in equity, is not founded on contract, but, as we have seen, on the principles of natural justice. Unquestionably, the devisees are not to be injured by the mistake

¹ 2 Dev. Eq. 69, 22 Am. Dec. 729.

² 2 Dev. Eq. 262.

of the executor, as to the extent of his power over their land; but that mistake should not give them unfair gains. The executor was not an officious intermeddler in paying off the debts of the testator, and his erroneous belief that he could indemnify himself in a particular way should not bar him from obtaining indemnity by legitimate means. It is not a question here, whether a mistake of law shall confer any rights, but whether such a mistake shall be visited with a forfeiture of rights wholly independent of that mistake.”¹

In the case of *Valle v. Fleming's Heirs*,² a void administrator's sale had been made, and the proceeds thereof applied to the payment of a mortgage existing on the lands sold. Ejectment was subsequently brought, to which the purchasers filed an equitable defense, and prayed to be subrogated to the rights of the mortgagees. Judge Napton, in delivering the opinion of the court, referred to the equity maxims, both of the common and of the civil law, as well as to the decisions of the American courts, and concluded as follows: “Nothing could be more unjust, we may repeat, than to permit a person to sell a tract of land and take the purchase money, and then, because the sale happens to be informal and void, to allow him, or, which is the same thing, his heir, to recover back the land and keep the money. Any code of law which would tolerate this would seem to be liable to the reproach of being a very imperfect, or a very inequitable one. We think that, upon well established principles of equity law, the owner of the land should, if he wishes to get it back, repay the purchase money which he has received, or which he will receive, if he gets the land. This may be done upon the compensation doctrine of courts of equity, with which, as it is settled on all hands, it is not inconsistent, if we regard the claim of the owner under such circumstances, as the Roman law treated it, as a case of

¹ *Scott v. Dunn*, 1 Dev. & Bat. Eq. 427, 30 Am. Dec. 174, and note; *Perry v. Adams*, 98 N. C. 167, 2 Am. St. Rep. 326.

² 29 Mo. 152, 77 Am. Dec. 557.

fraud or ill faith. But whether this equity be administered under the name of compensation, or by substituting the purchaser in the place of the creditors whose debts he has paid, or by giving him the benefit of the mortgage which his money has paid off, is not material. The answer put in by the defendants should not have been stricken out, and in order that the answer may be reinstated, and the case may be tried upon these equitable principles, the judgment is reversed, and the case will be remanded.”¹

The case of *Blodgett v. Hitt*² discusses more thoroughly than any other with which we are familiar the rights of purchasers under void probate sales. We copy so much of the opinion of the court as is devoted to this subject: “The evidence on this subject is, that the defendant bid off the land at the administrator’s sale for \$365; that out of this sum he paid the Boyd mortgage, amounting to nearly \$250, and that he paid the balance of the purchase money to the administrator. The whole of the purchase money was applied to the payment of the mortgage, of other debts against the estate, and of the expenses of administration. The land in question stood chargeable with the payment of such mortgage debts and expenses. The payments made by the defendant, on account of his purchase, enured to the benefit of the owners of the land. There is no manner of doubt but the defendant purchased the land, and paid his money therefor, in perfect good faith, supposing that he was obtaining the whole title thereto; and there is no pretense that he had any actual notice of the defect in the proceedings before the sale, which invalidates his title. The question

¹ *Valle’s Heirs v. Fleming’s Heirs*, 29 Mo. 164, 77 Am. Dec. 557. Judge Scott dissented in a vigorous and well written opinion, saying, among other things: “The defendants are volunteers and strangers in relation to the plaintiffs. No man can make another his debtor without his consent. Nor can any man pay a debt of another without his authority, and claim it of him. This is an important principle necessary to be preserved, and it is one which has had its influence in all cases in which it has been involved.”

² 29 Wis. 182.

then is, whether, under such circumstances, the defendant is entitled to be repaid the money which he has paid in good faith to relieve the land from incumbrances, before he can be turned out of possession thereof. Suppose, for illustration, that the liabilities against the estate of Pearley P. Blodgett, after the personal estate was exhausted, were just \$365, for the payment of which the land, which the administrator attempted to convey to the defendant, was chargeable. The interest of the heirs of Blodgett in the land was precisely that sum less than a full and perfect title thereto; that is to say, the creditors of the intestate owned an equitable interest therein to the amount of \$365, and the heirs were the owners of the residue. Now, when the defendant, supposing in good faith that he was thereby obtaining a title to the lands, paid those debts and took a conveyance of the land from the administrator, and when it turns out that, by reason of the failure of the administrator to perform and fulfill an essential prerequisite to a valid sale, the defendant gets no title by such conveyance, and the heirs recover the land, it must be admitted that there is no justice in giving the land to heirs, cleared of the incumbrances which the defendant has paid, without requiring them to repay the sums thus paid by him for their benefit. Otherwise, the heirs would recover a greater interest in the land than they inherited, by the sum of \$365, and the defendant would be out of pocket to that amount, paid by him for their benefit. The fact that the purchase money paid by the defendant only cancelled a small percentage of the indebtedness against the estate, does not change the principle. But the question is not alone—What is the natural and inherent justice of the case? but it is—Are the principles and rules of equity jurisprudence, as recognized and enforced by courts of equity, sufficiently broad and comprehensive to reach the case and compel the heirs to repay the sums which the defendant has thus paid for their benefit, before they will be permitted to take possession of the land

in controversy? We are of the opinion that this latter question must be answered in the affirmative, both upon principle and by authority. A brief reference will be made to a few of the leading cases, wherein it has been so held:

“*Hudgin v. Hudgin*,¹ was a case where a person, by will, charged his lands with the payment of his debts. After his death, a creditor procured an order from the proper court for the sale of some portion of the lands thus made chargeable with the debts of the testator. The lands were sold, and the proceeds applied to the payment of such debts. The sale and conveyance, executed pursuant thereto, were subsequently held void, and, in ejectment brought by some of the devisees of the land against the purchaser at such sale, or the person claiming under him, the devisee recovered judgment. The defendant in the ejectment filed his bill in equity and obtained an injunction, restraining proceedings upon such judgment, and upon proof of these facts the court of appeals of Virginia directed a decree declaring the purchase money, so paid by the complainant, or his grantor, on such void sale, and the interest thereon, after deducting therefrom the rents and profits of the land while occupied by the purchaser or his grantee (exclusive of improvements made by them respectively), to be a charge on the land, and providing that, unless the same should be paid by the devisees within a reasonable time, the land be sold for the satisfaction thereof, on terms to be prescribed for the purpose. This case is decided upon the principles that the purchaser, whose money has paid the incumbrances upon the land, has the right to be substituted to the rights of the creditor whose debt he has paid; and, because equity will not permit such creditor or incumbrancer, lawfully in possession, to be disturbed therein until his debt or incumbrance is fully satisfied, it will not permit such purchaser, who has paid the incumbrance in good faith, and is thereby

¹ 6 Gratt. 320, 52 Am. Dec. 124.

subrogated to the rights of the creditor, to be dispossessed until he is reimbursed for the moneys so paid by him.

“*Valle's Heirs v. Fleming's Heirs*,¹ is to the same effect. This is a very important and interesting case, and will justify a somewhat extended notice. The action was in the nature of ejectment. The plaintiffs claimed, as heirs of Valle, who died seized of the lands in controversy in the action. The defendants were in possession under certain conveyances, executed to their ancestor and his grantors by the administrators of the estate of Valle, pursuant to a sale of the land under an order of the proper court. In a former litigation these conveyances had been adjudged to be null and void by the supreme court of Missouri. In their answer the defendants alleged, as an equitable defense and counterclaim, that their ancestor and his grantors purchased the lands in good faith, and paid therefor \$50,000, which moneys the administrators applied to the payment and satisfaction of a mortgage upon said lands, and, perhaps, other lands of which Valle died seized. The defendant claimed that, notwithstanding the apparent and technical payment and extinguishment of such mortgage, equity would, under the circumstances, treat it as still subsisting and unsatisfied, for the protection of the purchasers from the administrators, or their grantees, and would subrogate such purchasers or grantees to all of the rights of the mortgagee, treating them as assignees and purchasers of the mortgage, for a valuable consideration by them paid. They also claimed that they were, in fact and in equity, in possession of the land in controversy as assigns of said mortgage, and fully entitled to set up the same against any person attacking their rights or possession thereto. The court below rejected these views of the case, and struck out from the answer such equitable defense and counterclaim; but the supreme court reversed the judgment below for that reason, and in a very able opinion by Judge Napton, a

¹ 29 Mo. 152, 77 Am. Dec. 557.

majority of the court fully sustain the theory of the defendants, and they were entitled to the equitable protection of the court as mortgagees in possession under an unpaid mortgage, and that their possession could not be disturbed until an account should be taken and the sum ascertained to be equitably due to them on the mortgage fully paid. In that case Judge Scott delivered a dissenting opinion, wherein he claims that the views of the majority of the court are unsustained by the cases; that the decision creates a new equity, or rather injects a new principle into the equity jurisprudence of the country; and further, that the defendant's ancestor and his grantors, who paid their money under a void sale and conveyance, were mere volunteers; and, because a man may not pay the debt of another without his authority and claim it of him, the learned judge concludes that the defendants (who had succeeded to all of the rights of the original purchasers) could not be subrogated to the rights of the mortgagee, and recover of the heirs, or out of the land, the money which was thus voluntarily paid on a void conveyance. It is believed that both these positions are untenable. That this is no new equity—one first recognized and asserted in that case—is abundantly shown by a reference to the cases cited in the majority opinion. Some of those cases will be hereinafter mentioned. Again, the lands having been purchased of the administrator in good faith, and at a sale which had been ordered to be made by the proper court, and the purchasers having paid a valuable consideration for the land, in the belief that they were obtaining a good title thereto, it cannot be said, in any reasonable or just sense, that they were mere volunteers. On the contrary, they paid their money at the request and by the procurement of the administrators; and inasmuch as the administrators were charged by law with the duty of converting the assets and paying the debt, it may well be held that they were the representatives of the heirs, to the extent that the latter should be held

bound by such request, and should not be heard to allege that the purchasers, whose money went to pay the incumbrance upon the land, were mere volunteers. The judge also speaks of the distinction between trusts and powers, and says that because the administrators have nothing but a mere power, without an interest, the land cannot be affected by their conveyance thereof, unless the power is executed pursuant to the terms of the statute by which it is conferred. In this the learned judge is doubtless correct, as he would have been had he said further, that where, as in that case, a power is created by law, equity will not relieve against a defective execution of it. But the result of these principles is, not that a purchaser in good faith at an administrator's sale is not entitled, in a case where the conveyance to him has been adjudged void, to be repaid by the heir, or out of the land, the money paid by him for such void conveyance, and applied in payment and satisfaction of incumbrances upon the estate, but only that the power having been defectively executed the conveyance is void, and a court of equity has no jurisdiction or authority to heal the defect and make it valid.

“The foregoing case was decided mainly upon the authority of the case of *Bright v. Boyd*.¹ This is, perhaps, the leading case on the question under consideration. Boyd, the defendant, had recovered judgment, in an action of ejectment, for certain premises in the possession of Bright, the complainant, whereupon Bright filed his bill in equity against Boyd, alleging that he was in possession of the premises in controversy, by intermediate conveyances from the administrator, with the will annexed of the estate of John P. Boyd, the father of defendant, but that the title under the administrator's deed had failed, or rather that the same conveyed no title by reason of the failure of the administrator to comply with certain requirements of the law, which were held to be essential to the validity of the

¹ 1 Story, 478, and 2 *Ib.* 605.

sale; and that the complainant, or those under whom he claimed in good faith, and believing that the deed from the administrator conveyed a good title to the premises, had made valuable and permanent improvements thereon. The object of the bill was to make the value of such improvements a charge upon, and to enforce payment therefor out of the premises which the defendant had recovered in the ejectment suit. The defendant, Boyd, made title to the land as devised under the will of his father. On proof of these allegations Justice Story, before whom the cause was heard, after great deliberation and research, gave the complainant the relief prayed in the bill, and, in the absence of any statutory provision on the subject, held the broad doctrine that, 'a *bona fide* purchaser for a valuable consideration, without notice of any defect in his title, who makes improvements and meliorations upon the estate, has a lien or charge thereupon for the increased value which is thereby given to the estate beyond its value without them, and a court of equity will enforce the lien or charge against the true owner, who recovers the estate in a suit at law against the purchaser.'

"The principle there asserted is precisely the same as that involved in the question under consideration in this case. In both cases, if the land is held chargeable, it is because the money of the purchaser under the void sale has been paid in good faith, and expended to increase the value of the estate. It is quite immaterial whether this was done by paying off incumbrances, or by making permanent and valuable improvements. In either case, the value of the inheritance is increased by the expenditure, and, as already observed, the plainest principle of justice demands that the heir or devisee should repay the money thus innocently expended for his benefit, to the extent that he has been benefited thereby. The opinion of Judge Story, in *Bright v. Boyd*, is exceedingly learned and able, and will well repay careful perusal and study. He traces the principle which

he applied there to the Roman law, and shows that it has been adopted into the laws of all modern nations which derive their jurisprudence from the Roman law, and demonstrates, by reference to the writings of Cujacius, Bothier, Grotius, Bell, Puffendorf, Rutherforth, and others, and by arguments which seem conclusive of the question, that 'such principle has the highest and most persuasive equity, as well as common sense and common justice, for its foundation.' We are not aware that the authority of that case has ever been shaken, or its correctness ever successfully assailed.

"Before dismissing the case of *Bright v. Boyd* from our consideration, I may be permitted to transcribe a passage from the opinion, to show how identical in principle that case is with the present one, and also to show the views of the eminent jurist who wrote the opinion upon the precise question involved in this case. Judge Story there says that 'it cannot be overlooked that the lands of the testator now in controversy were sold for the payment of his just debts, under the authority of law, although the authority was not regularly executed by the administrator in his mode of sale, by a non-compliance with one of the prerequisites. It was not, therefore, in a just sense, a tortious sale; and the proceeds thereof, paid by the purchaser, have gone to discharge the debts of the testator, and, so far, the lands in the hands of the defendant (*Boyd*) have been relieved from a charge to which they were liable by law. So that he is now enjoying the lands free from a charge which, in conscience and equity, he, and he only, and not the purchaser, ought to bear. To the extent of the charge from which he has been thus relieved by the purchaser, it seems to me that plaintiff, claiming under the purchaser, is entitled to reimbursement, in order to avoid circuitry of action, to get back the money from the administrator, and thus subject the lands to a new sale, or, at least, in his favor, in equity to the old charge. I confess myself to be

unwilling to resort to such a circuitry in order to do justice, where, upon the principles of equity, the merits of the case can be reached by affecting the lands directly with a charge to which they are *ex æquo et bono*, in the hands of the present defendant, clearly liable.¹

“After what has been already said, concerning the rule of the civil law on this subject, we should expect to find the courts of Louisiana asserting and enforcing that rule. Accordingly, we find, in *Dufour v. Camfranc*,² the following language: ‘It has been proved that the proceeds arising from the sale of the slaves were applied to the discharge of the judgment debts of the plaintiff, and the court is of opinion that he cannot recover in the suit until he repay that money. * * * Nothing could be more unjust than to permit a debtor to recover back his property because the sale was irregular, and yet allow him to profit by that irregular sale to pay his debts.’ It will be readily inferred from the foregoing extracts, that the action was brought to recover certain slaves, which the defendant had purchased at a sheriff’s sale upon an execution, which sale, it was afterwards held, was void and transferred no title to the slaves to the purchaser, but the proceeds of the sale went to pay judgment debts against the plaintiff. * * * We hold, therefore, that the whole purchase money, paid by the defendant for the land in controversy, and the interest thereon, less the *mesne* profits of the land (exclusive of the improvements placed thereon by him) during his occupancy thereof, is a lien and charge upon the land, and that the plaintiffs cannot have restitution of the land claimed by them until the amount of such lien and charge is paid.’”³

The more recent decisions have been in favor of recognizing and enforcing the claims of purchasers at void sales,

¹ 1 Story, 193.

² 11 Martin, 607 (2 Cond. La. Reports, 234), 13 Am. Dec. 364.

³ *Blodgett v. Hitt*, 29 Wis. 182. The following cases are in harmony

by whose purchase moneys have been realized, and when realized have been applied in payment of liens upon the property purchased, or of claims which, though not secured by any specific lien, were enforceable against the assets of the estate, and for the payment of which the lands in controversy might have been sold. The heirs will not be permitted to recover the property unless they reimburse the purchaser for the moneys paid by him, and which have benefited them by discharging claims against the estate.¹ Probably the only dissent from this proposition now is confined to those cases in which the proceeds of a probate sale are applied by the executor or administrator to the satisfaction of claims against the estate of the decedent which are not of themselves liens. Thus, it was determined in

with the one just cited: *Bright v. Boyd*, 2 Story, C. C. 605; *Mohr v. Tulip*, 40 Wis. 66; *Grant v. Loyd*, 12 S. & M. 191; *Levy v. Riley*, 4 Or. 392; *Short v. Porter*, 44 Miss. 533; *Williamson v. Williamson*, 3 S. & M. 715, 41 Am. Dec. 636; *Douglas v. Bennett*, 21 Miss. 680; *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124; *Winslow v. Crowell*, 32 Wis. 639; *Dunbar v. Creditors*, 2 La. Ann. 727; *Stockton v. Downey*, 6 La. Ann. 581; *Ragland v. Green*, 14 S. & M. 194. "If the sale be void or voidable, the lien of the administrator continues; and it would seem equitable that the purchaser, who has paid the debts of the estate, should have a lien on the estate for his purchase money." *Haynes v. Meeks*, 10 Cal. 110, 70 Am. Dec. 703. A purchaser has no claim against the heirs nor their estate for purchase money which he fails to show has been applied for their benefit. *Jane v. Boisgerard*, 39 Miss. 796. In Illinois, if application is made to a court of equity to set aside a sale, the relief will not be granted, unless the complainants do equity on their part, and refund so much of the purchase money as may have come into their possession. *Chambers v. Jones*, 72 Ill. 275. If the money paid by the purchaser has been applied to the extinguishment of liens on the property purchased, he is entitled to be subrogated to such liens. *Kinney v. Knoebel*, 51 Ill. 112. But where, in a probate sale, the money is paid to discharge debts not secured by any specific lien, the purchaser is without redress. *Bishop v. O'Connor*, 51 Ill. 437.

¹ *Shafer v. Causey*, 8 Mo. App. 142, 76 Mo. 365; *Jones v. Manly*, 58 Mo. 559; *Evans v. Snyder*, 64 Mo. 517; *Sharky v. Bankston*, 30 La. Ann. 891; *Hatcher v. Briggs*, 6 Or. 31; *Sands v. Lynham*, 27 Gratt. 291, 21 Am. Rep. 348; *Snider v. Coleman*, 72 Mo. 568; *Davis v. Gaines*, 104 U. S. 386; *Barrelli v. Ganche*, 24 La. Ann. 324; *Gaines v. Kennedy*, 53

Bishop v. O'Connor,¹ that the purchaser at a void administrator's sale was not entitled to subrogation, though the proceeds of the sale were applied to the satisfaction of claims against the decedent, on account of which the creditors might have compelled a sale of his real property. It was said that it was not accurate to say that the realty was charged with the payment of debts but rather that it was so chargeable only in the time and manner prescribed by the statute; that a purchaser must in such cases be regarded as a mere volunteer; that he was subject to the maxim *caveat emptor*, and, having apparently disregarded it, must suffer for his folly. Perhaps something like this was what the supreme court of Michigan intended to affirm in Frost v. Atwood.² However this may be, we think it safe to declare that, except in Illinois and Michigan, it is by no means essential to a claim for subrogation on the part of a purchaser at an executor's, administrator's or guardian's sale, that the moneys resulting from the sale be applied to the satisfaction of a demand constituting a lien against the property sold. It is sufficient that the creditors, though they had no lien against any specific property, were entitled to proceed in the court having jurisdiction of the estate, or

Miss. 103; Hill v. Billingsly, 53 Miss. 111; McGee v. Wallis, 57 Miss. 638; Jonet v. Mortimer, 29 La. Ann. 207; Davidson v. Davidson, 28 La. Ann. 269; Bland v. Bowel, 53 Ala. 152; Goodman v. Winter, 64 Ala. 410; Robertson v. Bradford, 73 Ala. 116; Ellis v. Ellis, 84 Ala. 348; Duncan v. Garney, 108 Ind. 579; Wilson v. Holt, 83 Ala. 528, 3 Am. St. Rep. 768; Stults v. Brown, 112 Ind. 370, 2 Am. St. Rep. 190; Perry v. Adams, 98 N. C. 167, 2 Am. St. Rep. 326; Pool v. Ellis, 64 Miss. 555; Davis v. Reaves, 7 Lea, 585; Catchcart v. Sugenhiner, 18 S. C. 123; Levy v. Martin, 48 Wis. 198; Crippen v. Chappel, 35 Kan. 495, 57 Am. Rep. 187; Bond v. Montgomery, 56 Ark. 563, 35 Am. St. Rep. 119; Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125; Milburn v. Phillips, 145 Ind. 93, 52 Am. St. Rep. 403; Pool v. Ellis, 64 Miss. 555; Cunningham v. Anderson, 107 Mo. 371, 28 Am. St. Rep. 417; Bailey v. Bailey, 41 S. C. 337, 44 Am. St. Rep. 713; Hull v. Hull, 35 W. Va. 155, 29 Am. St. Rep. 800.

¹ 69 Ill. 431.

² 73 Mich. 67, 16 Am. St. Rep. 560.

in some other competent tribunal to compel the sale of the property in question for the satisfaction of their claims. If so, he who has so satisfied them, though by his purchase at a void sale, is entitled to be put in the place of the creditors and to assert the remedy which, but for the sale and payment, they might have asserted. In equity, the claims thus paid must be regarded as still existing, and the purchaser as being the assignee thereof, and as such "entitled to be subrogated to all the rights of the original holders of such debts according to their respective priorities, in the same manner and to the same extent that the administrator would have if he had advanced and used his own money in the payment of the debts in question."¹ Speaking of a purchase at a void administrator's sale, the supreme court of North Carolina said: "The plaintiff, however, undertook to purchase the land, so far as appears in good faith, and to the extent that the money he paid to the administrator was applied to the payment of debts of the intestate and the costs of administration that the personalty was insufficient to pay, to that extent he relieved the land in question, and is entitled to be subrogated to the rights of creditors, whose debts and costs were so paid, and to have the sum of money due him charged upon the land."²

§ 54. Right to Subrogation, Whether Exists Only in Favor of an Innocent Purchaser.—It is a familiar principle, that whoever seeks equity must come with clean hands. Nearly all the cases in which relief has been granted to purchasers at void sales have proceeded upon the express ground that the purchaser had acted in good faith, and in ignorance of the irregularity by which his title was impaired. Certainly in all such cases the purchaser's good faith ought

¹ *Derneau v. Garney*, 108 Ind. 579; *Stultz v. Brown*, 112 Ind. 370, 2 Am. St. Rep. 190.

² *Perry v. Adams*, 98 N. C. 167, 2 Am. St. Rep. 326. To substantially the same effect see *Hunter v. Hunter*, 58 S. C. 382, 79 Am. St. Rep. 845; *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119.

to be regarded as material. In Pennsylvania and Texas, if a purchaser is guilty of a fraud, on account of which his purchase is adjudged void, he cannot reclaim his purchase money. He, in effect, forfeits it to those whom he sought to defraud, for they may retain the money and recover the estate.¹ In Mississippi, on the other hand, a fraudulent purchaser may assert the same equities as one who has acted in good faith.² It is true that in many of the decisions affirming the right to subrogation, the purchaser in whose favor it was affirmed was spoken of as having acted in good faith, and sometimes as being ignorant of the defect on account of which his title was found to be invalid. When there is actual fraud on the part of a purchaser he may doubtless be denied relief, as already suggested, on the ground that he does not come into equity with clean hands, but if, as some of the decisions indicate, the right to subrogation depends on the ignorance of the purchaser, then there is introduced in such cases a new and strange issue involving the mental capacity or the opportunities for information possessed by the purchaser. The whole doctrine may be rendered practically inoperative on the ground that each person is chargeable with knowledge of the law, and, notice of the proceedings under which he claims title, and therefore, may be denied relief on the ground that he was actually or constructively informed both of the law and the facts, and hence not entitled to the interposition of equity. Thus, in *Gerber v. Upton*³ it was conceded that a purchaser at an administrator's sale paid the full value of the property after an announcement that a perfect title thereto would be sold and conveyed, and that the sale was ordered for the purpose of raising money with which to satisfy a mortgage,

¹ *McCaskey v. Graff*, 23 Pa. St. 321, 62 Am. Dec. 336; *Gilbert v. Hoffman*, 2 Watts, 66, 26 Am. Dec. 103; *Jackson v. Summerville*, 13 Pa. St. 359; *Elam v. Donald*, 58 Tex. 316.

² *Grant v. Loyd*, 12 S. & M. 191.

³ 123 Mich. 605.

but there being certain homestead interests which did not pass by the sale, it was said: "We do not believe that complainant is in position to be subrogated to the rights of the mortgagee. He is presumed to know the law, and, therefore, to have known at the time that defendant had no right to thus contract away her children's homestead." So in *Huse v. Den*¹ while the decision of the court might have been, and to some extent was, rested on other grounds, it said: "When one purchases land at a void judicial sale, in entire ignorance that it is void, and in good faith pays money thereon, which is applied to the satisfaction of a lien or incumbrance upon the land, it has been held in some cases that he should be put in the place of the creditor, to the extent at least that his money has satisfied the lien. But in the case at bar the purchasers knew of the deed of trust and the will; knew of the want of power of the executors to sell without an order of the probate court; were warned not to purchase without the order and sanction of said court, and purchased in the face of this knowledge and caution. They were not, therefore, ignorant purchasers in good faith to whom the doctrine of subrogation would, under any circumstances, apply." It should be remembered respecting the case cited from Michigan, that the courts of that State are reluctant to concede the right of subrogation to purchasers at execution or judicial sales, and that, as to the opinion of the California court, it was rested on the additional ground that the proceeds of the sale had not been paid to the heirs, but to the executors and trustees, "who used the money indiscriminately with other moneys received from sales of personal property and other lands for various purposes." We cannot concede that the right to subrogation can be made to depend upon the purchaser's ignorance of the law or of the facts on account of which the sale must be declared void. In nearly all of the numerous cases heretofore cited by us the facts rendering the sale void might

¹ 85 Cal. 390.

have been discovered by an attentive examination of the proceedings resulting in the sale, and, of course, there is no denying the existence of the general presumption that every one knows the law. We therefore feel assured that subrogation cannot be denied to a purchaser on the ground of his familiarity, actual or presumed, with either the facts or the law, unless it further appears that his action has been induced by fraud or an apparent intention to recklessly disregard or subvert the rights of others.

§ 55. **Purchaser's Right to the Aid of Equity in Supplying Omissions and Mistakes.**—In every case where a purchaser has, in good faith, made and complied with his bid, his equities are of a very persuasive character, and usually appeal to our sense of justice more strongly than the equities of him who seeks to avoid the sale without placing the purchaser *in statu quo*. In many cases it is apparent that the vice which renders the sale a nullity has not, in fact, operated to the detriment of him whose property was sold. All the parties may have supposed the proceedings to be regular; the bidding may have been spirited; the price realized may have equalled, or, perhaps, exceeded the value of the property; the proceeds of the sale may have all been applied in the manner directed by law, and still some act or omission, unnoticed at the time, may render the purchaser's title utterly void at law. In such a case, our sense of justice revolts at the thought that he may be without redress. We naturally expect that equity will interpose to supply the omission, or that, on such terms as may be just, it will enjoin the parties in interest from availing themselves of an error which clearly has not impaired their rights. But, on seeking relief, we are at once confronted with the reminder that, "in cases of defective execution of powers, we are carefully to distinguish between powers which are created by private parties and those which are specially created by statute; as, for instance, powers of

tenants in tail to make leases. The latter are construed with more strictness, and, whatever formalities are required by the statute, must be punctually complied with, otherwise the defect cannot be helped, or, at least, may not, perhaps, be helped in equity, for courts of equity cannot dispense with the regulations prescribed by statute, at least where they constitute the apparent policy and object of the statute."¹ Perhaps this language, owing to the author's timidity of expression, may not necessarily dispose of the purchaser's claim for relief. The other authorities are more decisive, especially with regard to execution, judicial and probate sales. Thus, in a case decided by Judge Story, it appeared that an administrator's sale had been regularly licensed, and that all the requirements of the statute had been respected, save that requiring a bond to be given and approved prior to the sale. The judge, in his opinion, said: "Upon this case coming out on the trial of the action at law, (a writ of entry), the court held that the giving of the bond was by law an essential prerequisite to the sale; and, it not having been complied with, the sale was consequently invalid, and passed no title to the purchaser. It is now argued that however correct this doctrine may be at law, yet, in a court of equity, the omission to give the bond, within a stipulated time, ought not to be held a fatal defect, but it should be treated as a mistake, or inadvertence, or accident properly remediable in a court of equity. We do not think so. The mistake was a voluntary omission, or neglect of duty, and in no just sense an accident. But, if it were otherwise, it would be difficult, in the present case, to sustain the argument. This is not the case of the defective execution of a power created by the testator himself, but of a power created and regulated by statutes. Now, it is a well settled

¹ Story's Eq. Jur. sec. 96. See *Ib.* sec. 177; 1 Lead. Cas. in Eq. (4th Am. Ed.) 379; Freeman on Executions, sec. 332; *Tiernan v. Beam*, 2 Ohio, 465, 15 Am. Dec. 557; *Ware v. Johnson*, 55 Mo. 500; *Moreau v. Branham*, 27 Mo. 351; *McBryde v. Wilkinson*, 29 Ala. 662.

doctrine that, although courts of equity may relieve against the defective execution of a power created by a party, yet they cannot relieve against the defective execution of a power created by law, or dispense with any of the formalities required thereby for its due execution; for, otherwise, the whole policy of the legislative enactments might be overturned. There may, perhaps, be exceptions to this rule, but if there be the present case does not present any circumstances which ought to take it out of the general rule. Therefore, it seems to us that the non-compliance with the statute prerequisites, in the present case, is equally fatal in equity as it is in law.¹

In Illinois, certain heirs recovered a judgment in ejectment for lands purchased at a guardian's sale. The defect in the purchaser's title was the omission of the guardian to report the proceedings under the order of sale. The purchaser then filed a bill to enjoin the execution of the judgment in ejectment, and for general relief. The supreme court decided that the bill must be dismissed. Caton, J., in delivering the opinion of the court, considered and approved the views expressed by Judge Story in his Commentaries, and also in *Bright v. Boyd*, both of which have been quoted in this section. He further said: "If chancery may interfere and dispense with one of the requirements of the statute it may with another, and thus in its unlimited discretion it may fritter away the whole statute. It is seriously claimed that, because the purchaser purchased in good faith, and paid the full value of the property to the guardian of the owners, thereby an equity is raised in his favor and against them, which the court will enforce. Equities do not arise upon statutory acts without the violation of those against whom the equity is charged. Suppose this guardian, seeing that a case existed which would require the circuit court to order a sale of the infant's estate, and,

¹ *Bright v. Boyd*, 1 Story, C. C. 486.

in ignorance of the law, but in all honesty, had sold the estate for its full value, and without an order of court, to a purchaser who, in good faith, supposed he was getting a good title, in that case the purchaser's equity would be just as strong as is the equity in this case; and, should we now hold that the purchaser here acquired an equitable title, which should be enforced against the heir, it would be equally our duty, when the supposed case arises, to compel a conveyance to the purchaser, and then the entire statute would be gone. But the truth is, the purchaser at these statutory sales gets no imperfect equitable title which may be perfected in chancery; he gets the whole title which the infant had, or he gets no title whatever."¹

As equity will not supply an act omitted inadvertently or otherwise, so it will not correct a mere mistake, nor relieve the purchaser from the consequences of a mistake. Thus, if by mistake part of a tract intended to be embraced in an order of sale is omitted therefrom, or if a tract altogether different from the one intended is inserted therein, and the error passes unnoticed until after the sale, equity cannot relieve the purchaser, nor give him the tract which he supposed he was buying, and which the administrator or other officer intended to sell.² In Iowa this rule seems to be ignored. A judgment was entered in that State for the sale of a part of several lots of land. From the execution and other proceedings subsequent to judgment, one of these lots was omitted. After the sale and delivery of the deed, the purchaser discovered the omission. By a proceeding in equity he succeeded in setting aside the sale and the satisfaction of the judgment thereby produced, and obtained leave to issue a new execution in conformity with his judgment.³ This case, it will be seen, did not validate a void

¹ *Young v. Dowling*, 15 Ill. 481, 485.

² *Dickey v. Beatty*, 14 Ohio St. 389; *Mahan v. Reeve*, 6 Blackf. 215; *Ward v. Brewer*, 19 Ill. 291, 68 Am. Dec. 596; *Rogers v. Abbott*, 37 Ind. 138; *Runnels v. Kaylor*, 95 Ind. 503; *Keepfer v. Force*, 86 Ind. 81.

³ *Snyder v. Ives*, 42 Iowa, 157.

sale. It did, however, give relief, which ultimately proved as effectual; for it gave the right to make a sale of property which had not been sold at all. The reasons given for denying relief seem to be technical rather than equitable in their nature, and we are therefore not surprised to find a constantly increasing tendency to refuse to be governed by them. When a sale is made under execution, and some act is omitted on account of which the sale does not convey the legal title, it must be admitted that equity cannot supply the omission, and yet there are instances in which the courts have, in result, supplied it by compelling the defendant in execution not to avail himself of it. Thus, though there was an error in the advertisement of sale and in the deed, yet, because the judgment debtor was present at the sale, and making no objection thereto, permitted the purchaser to take and hold possession for several years, it was held that equity would correct the mistake.¹ On the other hand, where a mistake occurred by which a sheriff's deed included more land than was in fact sold, such error was in equity corrected upon parol evidence.²

Where a mistake, made in describing property in a mortgage, has been carried into the proceedings for foreclosure, so that a piece of land has been throughout improperly designated, the mortgagee is not without redress. He may, notwithstanding the judgment and sale, at least where he is the purchaser, maintain an action to reform the mortgage, and to foreclose it as reformed. The technical objection to this proceeding is, that the mortgage has already become merged in the judgment of foreclosure, and no longer exists for the purpose of being reformed. To this objection this reply is generally made: "The reformed mortgage is not merged in any decree, for there is no decree for the sale of any premises described in the mortgage, as corrected and

¹ *Thomas v. Dockins*, 75 Ga. 347.

² *Miller v. Craig*, 83 Ky. 623, 4 Am. St. Rep. 179; *Stiles v. Wiedner*, 35 Ohio St. 555.

reformed. The decree may be satisfied at least *pro tanto* to the amount of the sale; but the decree was based on the mistaken, and not the true, mortgage; the sale was of land not embraced in the true mortgage; no money or other valuable thing was ever received by plaintiff; the whole proceeding is infected by the original mistake, and is, therefore, baseless, unsubstantial and nugatory.”¹ Relief will be granted against all persons claiming under the mortgagor, who do not stand in the position of purchasers or incumbrancers in good faith, for value, and without notice.² Where some person other than the mortgagee has become the purchaser under the foreclosure, we presume his remedy must be by a suit seeking to be subrogated to the mortgagee’s right to have the mortgage reformed and foreclosed, according to the description intended by the parties.

The case of the actual sale of one parcel of property when another is described in the anterior proceedings presents a question of great difficulty. Is parol evidence admissible for the purpose of showing what was actually sold to the end that the title of the judgment debtor may be divested, or he enjoined from taking advantage of it? Where the sale is under execution, there is probably more difficulty in sustaining it than in the case of chancery or other judicial sales. Where the land was so described in the levy, notice of sale and sheriff’s deed that a patent ambiguity existed, it was held that the defect could not be cured in equity by the aid of extrinsic evidence.³ A sale may have been made under a mortgage, and the mistake may have occurred in that instrument and have been carried through all the subsequent proceedings, and yet all the parties to the suit, the officers making the sale, the purchaser, and all the other bidders may have had in mind only the particular parcel of

¹ Davenport v. Sovil, 6 Ohio St. 465; Conyers v. Mericles, 75 Ind. 443; State Bank v. Abbott, 20 Wis. 599; Blodgett v. Hobart, 18 Vt. 414.

² Strang v. Beach, 11 Ohio St. 283, 78 Am. Dec. 308.

³ Tatum v. Croom, 60 Ark. 487.

property intended to be included in the mortgage. There is little or no doubt in such a case that a second suit may be maintained to reform and foreclose the mortgage, but this would necessarily vacate the first sale and be of no aid to the purchaser, except in so far as he might be subrogated to the rights of the original mortgagee. May the purchaser by a suit in equity obtain the property which he supposed himself to be purchasing? While he has equities of a very high character, they probably do not entitle him to treat his purchase as a complete and binding acquisition of lands which have never been ordered sold, which no officer had any authority to sell, and which, therefore, could never have induced that competition among intending bidders which would have attended a sale by a proper description and based on unquestionable authority.¹ In California the rule is otherwise. In that State a mistake was made in describing the number of the block in which the lot intended to be mortgaged was situate. This mistake was repeated in the decree, order of sale and deed; but the sheriff pointed out to the bidders [the lot intended to be mortgaged, and sold it to one of them, who was the mortgagee. Under the sale he took possession, and, while continuing in possession, sold the lot and conveyed it by a correct description. The vendee, several years afterwards, intervened in a suit brought against his tenant to recover possession of the lot, and disclosed his equities to the court by appropriate pleadings. The court was of opinion that the mortgage, decree, and sheriff's deed might all be reformed in this proceeding, saying, in support of its judgment: "But it is said the mortgage cannot now be reformed, because it has become merged in the judgment of foreclosure, and that it is not competent for a court of equity to reform the judgment and the sheriff's deed. We have been referred to no authorities in support of this proposition, and, on principles

¹ *Miller v. Kolb*, 47 Ind. 220; *Lewis v. Owen*, 64 Ind. 446; *Angle v. Spear*, 66 Ind. 488; *Armstrong v. Short*, 95 Ind. 326.

of reason and justice, we do not perceive why a court of equity may not reform mistakes in judgments or decrees, in like manner as in written instruments. But it is said there was no mistake, either in the decree or sheriff's deed, which followed the description in the mortgage, and could not have done otherwise; and, consequently, there is no mistake to reform in either of them. As well might it be claimed that if there be a mistake in the first of a series of conveyances, which was carried out through all the subsequent conveyances, that the court could only correct the mistake in the first deed; and that, in fact, there was no mistake in the subsequent deeds, which were correctly copied from the first, as they were intended to be. But a court of equity does not administer justice on these narrow principles. It will not only go back to the original error and reform it, but will administer complete justice, by correcting all subsequent mistakes which grew out of and were superinduced by the first. It would be a rare thing to reform the first, and perpetuate the last, by refusing to disturb it. The rule in equity is to do nothing by halves, but, in proper cases, to administer a full measure of relief, so as to avoid circuity of action and promote the ends of justice."¹ The decisions in Florida and New Jersey are in harmony on this subject with that of California.²

If there is no mistake in the decree ordering a sale, or if the sale is made under an ordinary money judgment, and a mistake is made in the advertisement of sale, levy or deed, or in all of them, and it clearly appears that such mistake escaped attention, and that the officer sold, and the purchaser in good faith bought, certain lands which were in fact those intended to be levied upon, sold, and conveyed, there is a growing inclination on the part of courts of equity to relieve the purchaser, where so to do would be just, by reforming

¹ *Quivey v. Baker*, 37 Cal. 471.

² *Greeley v. De Cottes*, 24 Fla. 475; *Waldron v. Letson*, 15 N. J. Eq. 126.

the sheriff's deed, and, if necessary, the levy, and thereby vesting the purchaser with the title to that which was in fact intended to be sold and conveyed.¹

In those States wherein equity does not usually aid the defective execution of a statutory power, we judge that this rule cannot prevail where all the prerequisites prescribed by law have been observed, but the purchaser has either received no conveyance or one which is not such as he is entitled to receive. In this case, the parties whose property was sold will be enjoined from availing themselves of the omission,² or the officer will be compelled to perform his duty by executing a conveyance in proper form.³ Where everything has been done necessary to entitle the purchaser to a conveyance, little difficulty need be experienced by him in asserting his rights, whether a conveyance to him has been attempted or not. If the sale has been made by an executor, administrator, or guardian, and approved by the court, and payment of the purchase price has been made, the equitable title of the purchaser is complete, and the heirs will not be permitted to recover the property from him,⁴ though he may, on the other hand, maintain a suit against them to have vested in him the legal title,⁵ or to compel a conveyance thereof either by the original executor or administrator, or in the event of his decease or other inability to act, then by some person appointed by the court

¹ *Bartlett v. Judd*, 21 N. Y. 200, 78 Am. Dec. 131; *Colie v. Jameson*, 13 Nat. Bank, Reg. 4; *Stewart v. Pettigrew*, 28 Ark. 372; *Johns v. Rome*, 5 Blackf. 421; *Zingsem v. Kidd*, 29 N. J. Eq. 516; *Quivey v. Baker*, 37 Cal. 471.

² *Wortman v. Skinner*, 1 Beas. 358; *De Riemer v. De Cantillon*, 4 Johns. Ch. 85.

³ *Jelks v. Barrett*, 52 Miss. 315; *Stewart v. Stokes*, 33 Ala. 494; *Freeman on Executions*, sec. 332. Deeds of commissioners and administrators may, in certain cases, be reformed by equitable action in Missouri. *Houx v. County of Bates*, 61 Mo. 391; *Grayson v. Weddle*, 63 Mo. 523.

⁴ *Henry v. McKerlie*, 78 Mo. 416.

⁵ *Sherwood v. Baker*, 105 Mo. 472.

for that purpose.¹ When a sale has been made under execution, and no proper deed has been executed thereunder, there is no doubt, though a former conveyance has been made, yet if it is incorrect or unavailing, a remedy exists by compelling the execution of another deed,² and this may, in most of the States, be either by motion in the original case to obtain a rule commanding the sheriff to execute the deed, or by a proceeding in equity to compel the sheriff to comply with the terms of the certificate of purchase, and in some States a remedy exists by proceedings by *mandamus*.³ In North Carolina a sheriff's deed does not pass the title until recorded. If it is lost before registration, an action may be brought against the sheriff and the judgment debtor in which the purchaser may recover judgment that the officer execute a deed in lieu of the one lost, and also for the possession of the land.⁴

The time within which a sheriff's deed may be reformed or perfected has been but little considered. Ordinarily, one in possession of property may maintain a suit, irrespective of the lapse of time, to remove a cloud from, or to quiet his title, or to obtain written evidence of title, or to reform the conveyance under which he claims. While he is in possession, and until a prescriptive right to the possession has been created against him by a holding adverse to him, he retains the right to maintain any appropriate suit for the purpose hereinbefore stated.⁵ We know of no reason why the same rule should not be applied to sheriff's deeds. A purchaser, after the expiration of the time for redemption, has a complete equity and an absolute right to be invested with the legal title by the execution of the appropriate con-

¹ Dean v. Lanford, 9 Rich. Eq. 423.

² Moody v. Hamilton, 22 Fla. 98; Kruse v. Wilson, 79 Ill. 233; Ware v. Johnson, 55 Mo. 500; Hall v. Klezpig, 99 Mo. 83.

³ Freeman on Executions, sec. 326.

⁴ McMillan v. Edwards, 75 N. C. 81.

⁵ Tate v. Pensacola G., etc., Co., 37 Fla. 439, 53 Am. St. Rep. 251; Barbour v. Whitlock, 5 Mon. 180; Pomeroy on Contracts, sec. 404.

veyance. If he takes and holds possession of the property, his right to a conveyance is a continuing right, and may be enforced at any time. In Illinois, the time within which a sheriff's deed may issue has been limited by statute, and it has hence been held that an officer has no power to execute a second and correctory conveyance after the expiration of the time within which the original might lawfully have been executed.¹

¹ Ryhiner v. Frank, 105 Ill. 326; Parker v. Shannon, 137 Ill. 376.

CHAPTER VI.

THE CONSTITUTIONALITY OF CURATIVE STATUTES.

SECTION.

56. Curative Statutes Upheld by Supreme Court of United States.
57. Curative Statutes Confirming Irregular Judicial Proceedings.
58. Curative Statutes Confirming Void Judicial Proceedings.
- 58a. Special Statutes of Limitations in Favor of Purchasers.
59. Defects, other than Jurisdictional, which are Pronounced Incurable.
60. Informalities which may be Waived by Subsequent Statutes.
61. Limitation on Effect of Curative Statutes.
62. General Reflection Concerning Curative Statutes.

§ 56. **Curative Statutes Upheld by Supreme Court of United States.**—Numerous statutes have been enacted, professing to validate judicial sales and proceedings, which, without the aid of such statutes, were unquestionably inoperative, both at law and in equity. Such statutes are clearly retrospective. They also take at least the legal title away from its owner, and vest it in another person without due process of law. They usually, if not universally, do even more than this, for they give force to titles which are not less void in equity than at law. They have, therefore, been questioned as conflicting with express constitutional provisions, and also as violating some principles which, even without any direct constitutional expressions, must be admitted to prevail under every civilized form of government.¹

¹ For an annunciation of the rule that there must necessarily be some restraints upon legislative authority in every free and civilized country independent of direct constitutional prohibitions and assurances, see *Calder v. Bull*, 3 Dall. 386; *Wilkinson v. Leland*, 2 Pet. 556; *Loan Association v. Topeka*, 20 Wall. 663; *Story on the Const.*, sec. 1399.

We shall first call attention to a case which, as it arose in a State then having no constitution, may, perhaps, be accepted as an authoritative determination of this question, where it is to be answered solely from the constitution of the United States, as that instrument stood before the adoption of the fourteenth amendment. Jonathan Jenckes died in New Hampshire, leaving a will which was there admitted to probate. The executrix obtained a license of the judge of probate in New Hampshire, purporting to authorize her to sell lands in Rhode Island. Under this license she sold and conveyed lands in the last named State. The sale was confessedly void, because the courts of New Hampshire had no jurisdiction over lands situate in another State. She made an application to the legislature of Rhode Island, stating the facts in her petition, and thereupon an act was passed at the June session of 1792, ratifying and confirming the title based on her sales and conveyances.

In determining the constitutionality of this act Mr. Justice Story, delivering the opinion of the supreme court of the United States, said: "Rhode Island is the only State in the Union which has not a written constitution of government, containing its fundamental laws and institutions. Until the Revolution of 1776 it was governed by the charter granted by Charles II., in the fifteenth year of his reign. That charter has ever since continued in its general provisions to regulate the exercise and distribution of the powers of government. It has never been formally abrogated by the people, and, except so far as it has been modified to meet the exigencies of the revolution, may be considered as now a fundamental law. By this charter the power to make laws is granted to the general assembly in the most complete manner, 'so as such laws, etc., be not contrary and repugnant unto, but as near as may be agreeable to the laws, etc., of England, considering the nature and constitution of the place and people there.' What is the true extent of the power thus granted must be open to explanation, as

well by usage as by construction of the terms in which it is given. In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice and without offense. Even if such authority could be deemed to have been confided by the charter to the general assembly of Rhode Island as an exercise of transcendental sovereignty, before the revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its unconditioned and arbitrary exercise. The government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such intention.

“In *Terret v. Taylor*,¹ it was held by this court, that a grant or title to lands once made by the legislature, to any person or corporation, is irrevocable, and cannot be reassumed by any subsequent legislative act, and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the rights of the citizens to the free enjoyment of their property

¹ 9 Cranch, 43.

lawfully acquired. We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared, therefore, to admit that the people of Rhode Island had ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine.

“The question then arises, whether the act of 1792 involves any such exercise of power. It is admitted that the title of an heir by descent, in the real estate of his ancestor and of a devisee in an estate unconditionally devised to him, is, upon the death of the party under whom he claimed, immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title incumbered with all the liens which have been created by the party in his lifetime, or by the law at his decease. It is not an unqualified, though it be a vested interest, and it confers no title, except to what remains after every such lien is discharged. In the present case, the devisee, under the will of Jonathan Jenckes, without doubt, took a vested estate in fee in the lands in Rhode Island. But it was an estate subject to all the qualifications and liens which the laws of that State annexed to those lands. It is not sufficient, to entitle the heirs of the devisee now to recover, to establish the fact that the estate so vested had been divested, but that it had been divested in a manner inconsistent with the principles of law.

“By the laws of Rhode Island, as indeed by the laws of the other New England States (for the same general system pervades them on this subject), the real estate of testators

and intestates stands chargeable with the payment of their debts, upon a deficiency of assets of personal estate. The deficiency being once ascertained in the probate court, a license is granted by the proper judicial tribunal, upon the petition of the executor or administrator, to sell so much of the real estate as may be necessary to pay the debts and incidental charges. The manner in which the sale is made is prescribed by the general laws. In Massachusetts and Rhode Island, the license to sell is granted, as a matter of course, without notice to the heirs or devisees, upon the mere production of proof from the probate court, of the deficiency of personal assets. And the purchaser at the sale, upon receiving a deed from the executor or administrator, has a complete title, and is in immediately under the deceased, and may enter and recover possession of the estate, notwithstanding any intermediate descents, sales, disseizins, or other transfers of title or seisin. If, therefore, the whole real estate be necessary for the payment of debts, and the whole is sold, the title of the heirs or devisees is, by the general operation of law, divested and superseded; and so, *pro tanto*, in case of a partial sale.

“From this summary statement of the laws of Rhode Island, it is apparent that the devisee, under whom the present plaintiffs claim, took the land in controversy, subject to the lien for the debts of the testator. Her estate was a defeasable estate, liable to be divested upon a sale by the executrix, in the ordinary course of law, for the payment of such debts, and all that she could rightfully claim would be the residue of the real estate after such debts were fully satisfied. In point of fact, as it appears from the evidence in the case, more debts were due in Rhode Island than the whole value for which all the estate there was sold; and there is nothing to impeach the fairness of the sale. The probate proceedings further show, that the estate was represented to be insolvent; and, in fact, it approached very near to an actual insolvency. So, that upon

this posture of the case, if the executrix had proceeded to obtain a license to sell, and had sold the estate according to the general laws of Rhode Island, the devisee and her heirs would have been divested of their whole interest in the estate, in a manner entirely complete and unexceptionable. They have been divested of their formal title in another manner, in favor of creditors entitled to the estate; or, rather, their formal title has been made subservient to the paramount title of the creditors.

“Some suggestions have been thrown out at the bar, intimating a doubt whether the statutes of Rhode Island, giving to its courts authority to sell lands for payment of debts, extended to cases where the deceased was not, at the time of his death, an inhabitant of the State. It is believed that the practical construction of these statutes has been otherwise. But it is unnecessary to consider whether that practical construction be correct or not, inasmuch as the laws of Rhode Island, in all cases, make the real estate of persons deceased chargeable with their debts, whether inhabitants or not. If the authority to enforce such a charge by a sale be not confided to any subordinate court, it must, if at all, be exercised by the legislature itself. If it be so confided, it still remains to be shown that the legislative is precluded from a concurrent exercise of power.

“What, then, are the objections to the act of 1792? First, it is said that it divests vested rights of property. But it has been already shown that it divests no such rights, except in favor of existing liens, of paramount obligation, and that the estate was vested in the devisee, expressly subject to such rights. Then, again, it is said to be an act of judicial authority, which the legislature was not competent to exercise at all; or, if it could exercise it, it could be only after due notice to all the parties in interest, and a hearing and decree. We do not think that the act is to be considered as a judicial act, but as an exercise of legislation. It purports to be a legislative resolution, and not a decree.

As to notice, if it were necessary (and it certainly would be wise and convenient to give notice, where extraordinary efforts of legislation are resorted to, which touch private rights), it might well be presumed, after the lapse of more than thirty years, and the acquiescence of the parties for the same period, that such notice was actually given. But by the general laws of Rhode Island upon this subject, no notice is required to be, or is, in practice, given to heirs or devisees, in cases of sales of this nature; and it would be strange if the legislature might not do, without notice, the same act which it would delegate authority to another to do without notice. If the legislature had authorized a future sale by the executrix for the payment of debts, it is not easy to perceive any sound objection to it. There is nothing in the nature of the act which requires that it should be performed by a judicial tribunal or that it should be performed by a delegate, instead of the legislature itself. It is remedial in its nature, to give effect to existing rights.

“But it is said that this is a retrospective act, which gives validity to a void transaction. Admitting that it does so, still it does not follow that it may not be within the scope of the legislative authority, in a government like that of Rhode Island, if it does not divest the settled rights of property. A sale had already been made by the executrix under a void authority, but in entire good faith (for it is not attempted to be impeached for fraud), and the proceeds, constituting a fund for the payment of creditors, were ready to be distributed as soon as the sale was made effectual to pass the title. It is but common justice to presume that the legislature was satisfied that the sale was *bona fide*, and for the full value of the estate. No creditors have ever attempted to disturb it. The sale, then, was ratified by the legislature, not to destroy existing rights, but to effectuate them, and in a manner beneficial to the parties. We cannot say that this is an excess of legislative power, unless we are prepared to say that, in a State not having a written consti-

tution, acts of legislation having a retrospective operation, are void as to all persons not assenting thereto, even though they may be for beneficial purposes, and to enforce existing rights. We think that this cannot be assumed, as a general principle, by courts of justice. The present case is not so strong in its circumstances as that of *Calder v. Bull*,¹ or *Rice v. Parkman*,² in both of which the resolves of the legislature were held to be constitutional.”³

§ 57. **Confirming Irregular Judicial Proceedings.**—The decision just quoted is extreme in its character, in this, that it affirms the constitutionality of a statute which confirmed proceedings that had, of themselves, not even the shadow of validity. The defect in the title, made good by this statute, did not arise from any irregular exercise of existing authority, but from the palpable absence of all authority whatsoever. The court, under which the executrix had acted, was notoriously without jurisdiction in the matter. In so far as this decision maintains that proceedings, prosecuted without jurisdiction over the person or subject-matter, may be subsequently validated by legislative action, we think it is squarely in conflict with the opinions of the jurists of the present age. But mere irregularities of proceeding, though of so grave a character as to render a judicial or execution sale inoperative, may be deprived of their evil consequences by subsequent legislation. In Pennsylvania, a judgment prematurely entered was confirmed by an act of the legislature, after a sale of the defendants' property had been made under it. “The error in entering the judgment,” said the court, “is cured by the confirming act; the constitutionality of this no man can doubt. It impaired no contract, disturbed no vested right, and if ever there was a case in which the legislature ought to stretch

¹ 3 Dall. Rep. 386.

² 16 Mass. Rep. 326.

³ *Wilkinson v. Leland*, 2 Pet. 656.

forth its strong arm to protect a whole community from an impending evil, caused by mere slips, this was the occasion. Confirming acts are not uncommon—are very useful; deeds acknowledged defectively by *feme coverts* have been confirmed, and proceedings and judgments of commissioned justices of the peace, who were not commissioned agreeably to the constitution, or where their power ceased on the division of the counties, until a new appointment. This law is free from all the odium to which retrospective laws are generally exposed. Where a law is in its nature a contract, where absolute rights are vested under it, a law retrospectively, even if constitutional, would not be extended by any liberal construction, nor would it be construed by any general words, to embrace cases where actions are brought. Retrospective laws, which only vary the remedies, divest no right, but merely cure a defect in a proceeding otherwise fair—the omission of formalities which do not diminish existing obligations, contrary to their situation when entered into and when prosecuted; for one is consistent with every principle of natural justice, while the other is repugnant. The plaintiff in error could not be injured, whether the judgment was entered on the Monday or Wednesday of the week. It did not deprive him of any opportunity of defense. If he filed a counter statement or plea, appeared and took defense any time in the week, the court would have received it.”¹ But, as a general rule, the court will not uphold statutes which interfere with the effect of their pre-existing judgments.² In Indiana, however, a curative act was held valid, which made valid the proceed-

¹ Underwood v. Lilly, 10 S. & R. 97.

² Hence, the legislature cannot authorize a court to reopen its judgments after the time for appeal has expired. *De Chastellux v. Fairchild*, 15 Pa. St. 18, 53 Am. Dec. 570; *Hill v. Town of Sunderland*, 3 Vt. 507; *Davis v. Menasha*, 21 Wis. 491; *Taylor v. Place*, 4 R. I. 324; *Lewis v. Webb*, 3 Greenl. 326; *Denny v. Mattoon*, 2 Allen, 379, 79 Am. Dec. 784, overruling *Braddee v. Brownfield*, 2 W. & S. 271.

ings of a term of court held without authority of law.¹ But, in this State, the extreme ground is maintained, that a legislature may always make void acts valid, unless restrained by some direct constitutional provision.² In Massachusetts an executrix's sale was confirmed in a case where she had given no notice, as prescribed by law, of her petition for the license to sell, and the confirmatory act was declared valid. But in this case the heirs had, in writing, assented to the sale.³ In North Carolina, when there was doubt where certain suits should be brought, or whether certain probate proceedings should be before the probate judge or probate clerk, it was held that a statute validating proceedings when found to be erroneous in either respect was constitutional.⁴ Sales *en masse* may undoubtedly be validated.⁵

§ 58. **Proceedings Based on Void Judgments Cannot be Validated.**—One of the limitations on the enactment of valid curative statutes is, that a legislature cannot make immaterial, by subsequent enactment, an omission which it had no authority to dispense with by previous statute.⁶ It is usually understood that the legislature has no power to authorize an adjudication against a person without giving him any opportunity of making his defense. This he cannot make unless he has some notice of the proceeding against him. There must be something to give the court jurisdiction over his person. If, therefore, the proceedings had in a court are prosecuted without jurisdiction, the legislature cannot subsequently make them valid.⁷ An act

¹ Walpole v. Elliott, 18 Ind. 258, 81 Am. Dec. 358.

² *Id.*; Andrews v. Russell, 7 Blackf. 474; Grimes v. Doe, 8 Blackf. 371.

³ Sohler v. Mass. Gen. Hospital, 3 Cush. 483.

⁴ Ward v. Lowndes, 96 N. C. 367; Brickhouse v. Sutton, 98 N. C. 103, 6 Am. St. Rep. 497; Bell v. King, 70 N. C. 330; Herring v. Outlaw, 70 N. C. 334.

⁵ Wallace v. Feely, 10 Daly, 331.

⁶ State v. Squires, 26 Iowa, 340.

⁷ Hopkins v. Mason, 61 Barb. 469; Hart v. Henderson, 17 Mich. 218; Griffin v. Cunningham, 20 Gratt. 109; Lane v. Nelson, 79 Pa. St. 407;

was passed by the legislature of Illinois, and being invoked for the purpose of sustaining proceedings where no service of summons had been made on the defendants, its validity was denied in an opinion by Caton, C. J., in the course of which he said: "If it was competent for the legislature to make a void proceeding valid, then it has been done in this case. Upon this question we cannot for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other. By the decree of this case, the will in question was declared void, and, consequently, if effect be given to the decree, the legacies given to those absent defendants will be taken from them and given to others, according to our statutes of descents. Until the passage of the act in question, they were not bound by the verdict of the jury in this case, and it could not form the basis of a valid decree. Had the decree been rendered before the passage of the act, it would have been as competent to make that valid as it was to validate the antecedent proceedings, upon which alone the decree could rest. The want of jurisdiction over the defendants was as fatal to the one as it could be to the other. If we assume the act to be valid, then the legacies, which before belonged to the legatees, have now ceased to be theirs, and this result has been brought about by the legislative act alone. The effect of the act upon them is precisely the same as if it had declared, in direct terms, that the legacies bequeathed by this will to these defendants should not go to them, but should descend to the heir at law of the testator, according to our law of descent. This, it will not be pretended, they could do directly, and they had no more authority to do it indirectly, by making proceedings binding upon them which

Pryor v. Downey, 50 Cal. 389, 19 Am. Rep. 656; *Wells County v. Fahler*, 132 Ind. 426; *Israel v. Arthur*, 7 Colo. 5.

were void at law.”¹ In the case just cited, no sale had been made. It was a suit in equity to set aside a will. A trial had been had, resulting in favor of the plaintiffs. It was then discovered that certain non-resident minor defendants, who had answered by guardian *ad litem*, had not been properly served with process. The effect sought by the statute was simply to validate a void judgment. In the case of *Nelson v. Rountree*,² it appeared that a judgment had been entered in an action in which the summons was served by publication. There was no authority for such service, because the affidavit for the order of publication failed to show that a cause of action existed against the defendants. The judgment was, therefore, void. The legislature subsequently declared that “all orders of publication, heretofore made, shall be evidence that the court or officer, authorized to grant the same, was satisfied of the existence of all the facts requisite to granting such order or orders, and shall be evidence of the existence of such facts.” Perhaps the constitutionality of this statute might have been maintained, on the ground that it simply created a rule of evidence, or shifted the burden of proof from one person to another.³ The supreme court of the State, however, regarded it as a confirmatory act, and denounced it as follows: “If it was competent for the legislature to make this declaration, then it was competent for it to have declared that to be a judgment, which was before no judgment, and binding on the party against whom formerly rendered, when before he was not bound at all; for such is the direct result. It is a proposition, not now to be discussed at this day, that the legisla-

¹ *McDaniel v. Correll*, 19 Ill. 228, 68 Am. Dec. 587.

² 23 Wis. 367.

³ The legislature may change the burden of proof by enacting that proceedings theretofore taken in a court of special or limited jurisdiction shall be presumed, *prima facie*, to have been taken rightfully, and thus compel a person assailing such proceedings to show that the court never acquired jurisdiction. *Chandler v. Northrop*, 24 Barb. 129.

ture has no such power.”¹ Speaking of an act of assembly purporting to validate certain proceedings in partition, which were void because one of the defendants had no notice of their pendency, the supreme court of Pennsylvania said: “The act itself is unconstitutional and void, as an infringement of the inhibition contained in the ninth section of the declaration of rights, article IX of the constitution, that no person ‘can be deprived of his life, liberty and property, unless by the judgment of his peers, or the law of the land.’ What is the act but a mere bold attempt to take the property of A and give it to B? It was not a case in which the mere irregularity of a judgment, or a formal defect in the acknowledgment of a deed, was cured, where the equity of the party is complete, and all that is wanting is legal form. Such were *Underwood v. Lilly*,² *Tate v. Stooltzfoos*,³ *Satterlee v. Matthewson*,⁴ and *Mercer v. Watson*.⁵ On the contrary, it is very clearly within the principle of *Norman v. Heist*,⁶ *Greenough v. Greenough*,⁷ *De Chastellux v. Fairchild*,⁸ *Bagg’s Appeal*,⁹ *Shafer v. Eneu*,¹⁰ and *Shonk v. Brown*.¹¹ These cases abundantly sustain the position that an act of the legislature cannot take the property of one man and give it to another, and that when it has been attempted to be taken by a judicial proceeding, as a sheriff’s sale, which is void for want of jurisdiction, it is not in the power of the legislature to infuse life into that which is dead—to give effect to a mere nullity. That would be essentially a judicial act—to usurp the prov-

¹ *Nelson v. Rountree*, 23 Wis. 370.

² 10 S. & R. 97.

³ 16 S. & R. 35, 16 Am. Dec. 546.

⁴ 16 S. & R. 191.

⁵ 1 Watts, 330.

⁶ 5 W. & S. 171, 40 Am. Dec. 496.

⁷ 11 Pa. St. 489.

⁸ 15 Pa. St. 18, 53 Am. Dec. 570.

⁹ 43 Pa. St. 512.

¹⁰ 54 Pa. St. 304.

¹¹ 61 Pa. St. 320.

ince of the judiciary—to forestall or reverse their decision.¹ Of course, the legislature can no more validate proceedings before a court or officer incompetent to entertain and decide them, than it can vivify judgments void for want of jurisdiction over the person of the defendant.”²

In *Stevens v. Enders*,³ the supreme court of New Jersey determined that, with respect to estates in remainder, the judges of the court of common pleas had no authority to order or approve a sale in partition. In March, 1861, the legislature undertook to validate all sales made in partition, notwithstanding the existence of estates in remainder or reversion, unless the proceedings for partition “shall have been reversed or set aside on *certiorari*, writ of error, or other proceedings to review the same, brought within three years after such partition sale.” When this statute came before the court, it was declared unconstitutional in a very forcible opinion, the chief grounds of which were: 1st, that when the partition sale was made, the court had no jurisdiction over either the estate in remainder, or the persons of the remainder-men; 2d, that as a consequence of this want of jurisdiction, the estates in remainder must have, notwithstanding the partition sale, remained vested in the remainder-men, until the passage of the act of March, 1861; 3d, that to allow such estates to be divested by such act is to take them “without a hearing, or an opportunity for a hearing being given to the owner,” and is an infringement upon that part of the bill of rights in the constitution of 1844, declaring that one of the inalienable privileges of men “shall be that of possessing and protecting property.” The court also distinguished cases which had arisen under the prior constitution from those existing under the constitution of 1844, showing that, prior to the adoption of the

¹ *Richards v. Rote*, 68 Pa. St. 255.

² *Denny v. Mattoon*, 2 Allen, 383; *State v. Doherty*, 60 Me. 504; *Pryor v. Downey*, 50 Cal. 389, 19 Am. Rep. 656.

³ *Green*, 271.

latter constitution, the power of the legislature was, perhaps, as unlimited as that of the legislature of Rhode Island, as established by the decision in *Wilkinson v. Leland*, but that by the constitution of 1844, the powers of government were distributed into three departments—legislative, executive and judicial—and each department was forbidden from infringing upon the other. “Since this explicit marking out of the several departments, it has been the general opinion, so far as I can learn, that the legislative power is the only power vested in the legislature. The power of the legislature being then thus limited to the single field of action, how is the enactment of the present law to be vindicated? If it has the effect intended, it takes this vested estate out of these remainder-men and converts it into money. The question whether the owner’s land shall, without his assent, be turned into money, has always, at the common law and in this State, been deemed one addressed to the judicial discretion. The right to decide in such junctures has been always confided, in part, to courts of equity.”¹

Congress, by the act of June 3, 1874, declared, respecting the territory of Utah, that “all judgments and decrees heretofore rendered by the probate courts which have been executed, and the time to appeal from which has, by existing laws of said territory expired, are hereby validated and confirmed.” Under this statute a decree of divorce was attempted to be sustained, though but for such statute, admitted to be void. It was insisted that congress, in the exercise of its legislative authority, could have granted the divorce in the absence of any judicial proceeding, and it therefore could, though such proceeding was void, validate the divorce. The court was inclined to the opinion that in pursuit of the inquiries necessary to be pursued in determining whether a divorce ought to be granted, and in granting it, judicial functions were exercised which it was

¹ *Maxwell v. Goetschius*, 40 N. J. Law, 383, 29 Am. Rep. 242.

not competent for the legislature to perform. Respecting the general authority of the legislature, and particularly of congress, the court said: "It does not possess absolute power. It has no more power to make a valid decree out of a void one than it has to make such a decree out of a sheet of blank paper. It cannot make black white, or white black, or something out of nothing. Undoubtedly, the law-making department of the government may validate judgments and decrees voidable on account of errors or irregularities merely. If the court has jurisdiction of the subject-matter and of the person, and some essential step is omitted, which the legislature had the right to dispense with, it may validate the judgment or decree, notwithstanding the omission or irregularity. The legislature prescribes the methods and mode of procedure, and the rules under which judicial power may be exercised, and in doing so may dispense with such formalities as are not essential to the jurisdiction of the court. Whatever it may have dispensed with by law before action brought, it may dispense with by statute afterward. It cannot, however, dispense with jurisdiction of the subject-matter of the suit, or of the parties, nor with the complaint, declaration, petition, or claim. There must be some right, duty, or claim specified. There must be a subject-matter, and it must be such a one as the court has the right to take jurisdiction of, and if the judgment or decree is to be based upon facts, they must be first ascertained and found to exist. These requirements are essential to remedial justice, and appear to be axiomatic."¹

It is usually said that the legislature cannot validate void judicial proceedings or make good a title dependent thereon. We are satisfied that this is not universally true. We regard such proceedings as void, if, when offered in evidence under the laws in force when they were prosecuted, they must be declared to be of no effect. This happens when

¹ *In re Christensen*, 17 Utah, 412, 70 Am. St. Rep. 794.

the court does not have jurisdiction either of the subject-matter, or of the person of the defendant or of the other person whose title is sought to be divested. Doubtless if a judgment or other judicial proceeding takes place under such circumstances that no notice, actual or constructive, was given to the defendant or other person in interest, and he was thereby cut off from the opportunity to be heard, it cannot be validated by subsequent legislation, for the legislature could not, in advance, have authorized such a proceeding. But there are many instances in which a judgment or other judicial proceeding must be deemed void, because of the omission of some act or the absence of some condition with which the legislature was perfectly competent to have dispensed. The application of the general rule that what the legislature could have dispensed with in the first instance, as a condition precedent to the validity of judicial action, it may dispense with afterwards, must require the sustaining of many statutes curing judicial proceedings which, before the enactment of such statutes, were void. Thus, the Code of Alabama authorizes the probate court of that State when a mistake has been made in the description of lands in a petition, order, or other proceeding resulting in their sale, on application of the purchaser or one claiming under him, to correct such mistake; and this statute was sustained and held applicable to pre-existing sales on the ground that it was merely conferring on these courts a power analogous to that possessed by courts of equity in other cases of reforming or compelling the specific performance of contracts.¹ This line of decisions, if applicable to mistakes of a certain character, is of questionable soundness, for we apprehend that the legislature could not, in advance, authorize an executor or administrator who applied for and obtained an order for the sale of one parcel to sell another and entirely different parcel. The statute can be sustainable only in those cases in which it appears that there was an intention

¹ *Brown v. Williams*, 87 Ala. 353.

to apply for and to authorize a sale of a specific tract of land, that the parties to the sale so understood, and that the sale was for a fair price, so that the purchaser must, under the circumstances, though not possessed of the legal title, be regarded as equitable entitled to receive it.

Executors who were appointed in the State of the testator's domicile pursuant to a power contained in his will, sold his real property situate in another State without first procuring any order or authorization or approval from the courts of the latter State. Subsequently its legislature validated the sale, and this action was sustained on the ground that the will gave the executors power to sell under the circumstances, and in the manner pursued by them. As against the contention that the property had been sold for less than its value, the court responded: "If we could see that this was the result of want of confirmation to the requirements of the law in the mode of making the sale, we should be inclined to think that the plaintiff's right to have the proper mode pursued was such that the sale could not be legalized. There is nothing in the case that leads us to conclude that such was the fact. The executors were not obliged to sell at that or any other time. We must presume, then, that they sold because, in their judgment, they obtained the full value of the property, and the testator made their judgment the sole arbiter of such question."¹

The legislature may unquestionably authorize an executor or administrator of a decedent to sell his property under certain circumstances, and it would be competent to authorize such sale without first requiring any petition or order or any previous notice to the heirs. But generally, not only are such petition, notice, or order required, but the contents of the petition are prescribed, as well as the notice to be given and the other proceedings to be taken, and any substantial omission has the effect of avoiding the sale. The

¹ *Smith v. Callaghan*, 66 Iowa, 552.

legislature may nevertheless interpose and validate such sales, at least where the purchaser has acted in good faith, and their validation does not offend the principles of natural justice. The statutes of Oregon, enacted in 1878, provide that all sales by executors and administrators of their decedent's real property in that State to purchasers for a valuable consideration, which had been paid to such executors or administrators, and which sales had not been set aside by any court, but had been confirmed or acquiesced in by it, should be sufficient to sustain an executor's or administrator's deed, and that such deed should be sufficient to entitle the purchaser to all the title which the decedent had in the property, and that all irregularities in obtaining the order of the court for the sale or in making or conducting the sale should be disregarded. A prior act of the same State had declared that when any sale had theretofore been made by an executor or administrator under or by virtue of any license or order of court, and the sale approved, and the purchaser should have paid the purchase money, and the executor or administrator have failed to make the deed; or if from any mistake or omission in the deed or defect in its execution it should be inoperative, and the period of five years shall have elapsed after making the sale, then the sale, if made in good faith, was confirmed and approved, notwithstanding any irregularities or infirmities in the proceedings prior to the sale. These acts were by the supreme court of the State approved as "wholesome regulations of law," and it was declared that "the heirs to the property sold have no grounds for complaint on account of the enforcement of their provisions." The court further said: "The title of the heirs to the property is subject to the paramount right of the government to direct its disposition, if necessary, for the purpose of liquidating existing claims against the estate of the decedent. The heirs' title vests in them by operation of law, but is subject to such right of disposition. If, therefore, the property is sold under an

order of the probate court by a duly-appointed and qualified executor or administrator, for the purposes mentioned, and a valuable consideration has been paid therefor by the purchaser in good faith, the heirs are not deprived of any vested right, although the conditions upon which the general statute authorized the sale to be made were not strictly complied with. Under the general statute the executor or administrator, in order to obtain a license to sell real property belonging to the estate of the decedent, must file a petition containing certain facts. The probate court must thereupon issue a citation to the heirs to show cause why the property should not be sold to pay claims against the estate, which must be returned with the proof that it had been served in the manner prescribed by statute. In proceedings of that character a defect in the petition, citation, or in the proof of the service of the citation, will, under the general statute, render the sale a nullity. And although an order were made in due form to sell the property, and it were sold for its full value by the executor or administrator, and the proceeds were received by him and applied in good faith to the payment of the debts against the estate, which are charged by law upon the property, yet the heirs could reclaim it freed from the charge. For the purposes, therefore, of preventing such flagrant injustice, the said curative acts were passed. And it cannot be maintained that they were adopted in order to obviate the effect of mere informalities. The legislature, for the purpose of preserving to the heirs their inheritance, provided that certain prerequisites should be observed as a condition to the right of the representative to legally sell it. The effect of the said provision was, that a sale made without a compliance with such prerequisites was void, and in order to prevent such consequence in a certain class of cases the said curative acts were adopted. Their object evidently was to render valid sales made under the circumstances specified in the sections of said acts above set out, which would otherwise have been void. It was to

prevent injustice, which is ample apology for upholding that character of legislation.”¹

The legislature of Washington in 1890 enacted that sales of property by an executor, administrator, or guardian should, if the property was in the hands of a *bona fide* purchaser, be regarded as valid, if he was ordered to make a sale by the court having jurisdiction, had executed a bond approved by the proper judge, given notice of the time and place of sale, and sold the premises accordingly at public auction, and the sale was confirmed by the court. It appeared that before the enactment of this statute a petition had been made for an order to sell real property, that such petition was insufficient because it failed to describe, as the statute required, all the real property of which the testator died seized, and also failed to state the amount of the personal estate which had come into the administrator's hands, and how much, if any, remained undisposed of, and further, that the order to show cause why the prayer of the petition should not be granted had not been published for four weeks prior to the time first appointed for the hearing of the petition. The court was of the opinion that the irregularities complained of did not affect the jurisdiction to order the sale, and that the sale was validated by the statute. “It is true,” said the court, “the law then provided in relation to sales of real estate that a petition should first be presented to obtain an order therefor, and a citation issued thereon notifying parties interested to appear at the time set for the hearing. But could not the legislature have dispensed with this petition? It seems to us, unquestionably, the legislature has such power, as the court acquired jurisdiction of the estate by the appointment and qualification of the administrator; and the administration of an estate being a proceeding *in rem*, the legislature could have provided for a sale of the lands without any petition or notice whatever. If this is true the legislature could there-

¹ Mitchell v. Campbell, 19 Oreg. 198.

after pass the statute in question validating sales where no petition had been filed when the particular things therein specified appear. It is therefore immaterial whether this petition in question and the citation to appear at the hearing were void in consequence of the failure to give the prescribed notice or for any other reason. The respondent's title can safely rest on the subsequent proceedings and the curative act aforesaid under the conceded facts of the case."¹

The courts of Maryland have, we think, overlooked the distinction supported by the two decisions last cited, and have maintained the broad proposition that, when judicial proceedings have become final and are then void, they cannot subsequently be validated, though their invalidity was dependent upon acts or omissions which the legislature might have authorized.²

§ 58a. Special Statutes of Limitations in Favor of Purchasers at Void Sales.—Frequently, instead of assuming to validate void judicial proceedings, the courts have prescribed special statutes of limitation as against persons suing to recover property, the title to which is dependent upon such proceedings. Where such is the case, the general construction of such statutes is, that they can be applicable only as against persons who were parties or the successor in interest of parties to the judgment or other proceeding, and further that such proceeding must not in itself have been void for want of jurisdiction over the party or predecessor in interest of the party against whom it is sought to be asserted. A statute of Arkansas declared that "all actions against the purchaser, his heirs, or assigns, for the recovery of lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter; saving to minors and persons of unsound mind, the period of three years after such disability shall have been removed." It was sought to apply this statute for the

¹ *Ackerson v. Orchard*, 7 Wash. 377.

² *Willis v. Hodson*, 79 Md. 327; *Roche v. Waters*, 72 Md. 264.

purpose of preventing the recovery of property which had been the subject of a suit in partition, to which, however, the owner was not a party. The court said: "No question of title to the property was involved or could have been tried in that suit. No notice of the suit was given to any of the real owners of the land. May the legislature of the State provide that strangers to the title to land may institute and maintain a suit between themselves, and obtain a judicial sale of the property without notice to the real owners, and thereby, or by the lapse of time thereafter, without adverse possession or notice to the owners, divest their title? The question is susceptible of but one answer. Such an act would fall under the ban of the constitutional provision which has been already considered. It would give to the parties whose title was to be divested no opportunity to be heard respecting the judgment recovered, or the effect of the proceedings had. It would be a proceeding which condemns without hearing, proceeds without inquiry, and renders judgment without trial. It would not be due process of law. If the purpose of this statute was to divest the title of the owner of land in this way, it is unconstitutional and void. It is not probable that the legislature intended to work such an injustice. The true interpretation of the statute probably is, that those who claim under the parties whose rights were heard and adjudicated in a given suit may not attack the title of the purchaser under a judicial sale in that proceeding five years after the date of the sale. Such a construction avoids the constitutional difficulty, because the persons thus barred stand in privity with the parties to the suit, and have constructive notice of, and an opportunity for, a hearing and a decision of their claims. Any broader construction renders the statute ineffectual. Laws of this character have frequently been enacted by the legislatures of the various States. They generally limit attacks upon judicial sales made in proceedings in the nature of proceedings *in rem*, such as guardians' sales, administrators' sales,

sales in proceedings to collect taxes, and other sales of this nature, in which jurisdictional notices run against all the world or all the persons interested in the property or in the estates. But the rule is, even in these cases, that special statutes of limitation have no application to cases in which the notices required to be given are so insufficient in themselves, or so defectively served that no jurisdiction to take the proceedings against the parties interested is conferred. Thus, in *Pursely v. Hayes*,¹ which was an attack by a ward upon a guardian's sale protected by this statute: 'No person can question the validity of such sale after the lapse of five years from the time it was made,'—it was held where one, without semblance of authority, acted as guardian in making the sale, or one who was lawfully appointed guardian, made the sale without any notice to the ward or pretense thereof, the purchaser could not use the statute to protect him in his title. In *Boyles v. Boyles*,² the heir of a deceased person attacked an administrator's sale more than five years after it was made, and the purchaser sought to sustain it under this statute: 'No action for the recovery of real estate sold by an executor can be sustained by any person claiming under the deceased unless brought within five years next after the sale.' But the sale had been made without the notice required by law, and the court held that the statute had no application to cases where there was no valid sale on account of the want of the jurisdictional notice.³ In the State of Minnesota the collection of taxes against real estate is enforced by means of the entry of a judgment in the court of general jurisdiction upon a publication of a list of the real estate, and of notice of the time and place when the application for judgment will be made. After this tax judgment is rendered, a sale of the property is made under a proper notice. The statute then provides: 'The judgment and

¹ 22 Iowa, 11, 25.

² 37 Iowa, 592.

³ Citing *Good v. Norley*, 28 Iowa, 188. To the same effect in *Rankin v. Miller*, 43 Iowa, 11, 21.

sale herein provided for shall not be set aside unless the action in which the validity of the judgment or sale shall be called into question, or the defense to any action alleging its invalidity, be brought within nine months of the date of said sale. Numerous cases have arisen in which the published list and notice of application for judgment failed to properly describe the real estate in controversy, and the purchaser has endeavored to sustain his title under this statute. The supreme court of Minnesota has uniformly held that it was not within the power of the legislature to declare that a mere claim of title on paper should ripen into good title as against the lawful owner of the property, and that the effect of this statute must be restricted to cases in which the jurisdictional notice was sufficient in itself, and properly served.¹ If these special statutes of limitations are insufficient to sustain the title of purchasers in proceedings of this nature unless the jurisdictional notices are given to the parties interested, much less can a statute be sustained which undertakes to enable strangers to the title to land to divest it from the owner by a judicial sale in a suit between themselves without any notice to the owner of the property, or any adverse possession. It will be noticed that this statute is not in any proper sense a statute of limitation. It does not operate as the foundation of title to property in possession. By its terms it gives to the purchaser at a judicial sale in a proceeding to which the owner is not a party, the absolute title to the owner's property five years thereafter, although the owner may, during all this time, be in possession of the property, or it may be vacant and unoccupied, so that he could not maintain an action for its possession. The five years' run regardless of the possession from the time of the sale.² The statute does not

¹ *Feller v. Clark*, 36 Minn. 338, 340; *Kipp v. Fernhold*, 37 Minn. 132, 134; *Baker v. Kelly*, 11 Minn. 480; *Smith v. Kipp*, 49 Minn. 119, 125.

² *Mitchell v. Etter*, 22 Ark. 178, 181, 183; *Keatts v. Fowler's Devises* 22 Ark. 483, 485, 487.

take away certain forms of remedy and leave the property right of the parties unaffected. It divests the property of the owner and vests it in the purchaser at the judicial sale five years after it was made regardless of possession and regardless of notice to the owner. It was not within the power of the legislature to produce such a result by the mere enactment of a statute. The conclusion is that section 4818, Sand. & H. Dig. Ark. 1894, cannot be invoked to sustain the title to land under a judicial sale against strangers to the judicial proceeding in which the sale was made.”¹

§ 59. **Defects, other than Jurisdictional, Which have been Held Incurable.**—There are other defects, besides jurisdictional ones, on account of which void sales have been pronounced incurable. In Pennsylvania, an execution sale was void because made after the return day of the writ. Subsequently, the legislature enacted that: “All sales of real estate made by sheriffs or coroners, after the return day of their several writs of *levari facias*, *feri facias*, *venditioni exponas*, or other writ of execution, shall not, on account of such irregularity in such proceedings, be set aside, invalidated, or in manner affected; and such sales so made shall be held as good and valid, to all intents and purposes, as if such sale has been made on or before the return day of the writs respectively.” The supreme court of the State, in deciding a case arising under this act, asked these questions: “Is this act constitutional? The sale being made contrary to legislative enactment, and declared by this court utterly void, can the legislature validate such a sale to the injury of another party? In plain English, can they take one man’s property and give it to another—property which is secured to him by the constitution and laws?” It then answered the questions as follows: “In this case, the purchaser bought in the face of a recent statute which he was bound to know and obey, and purchased with his eyes open. He has no moral claim to have the sale made good.

¹ *Alexander v. Gordon*, 101 Fed. Rep. 91.

The act of the legislature which covers this case is unconstitutional and void.”¹ A sale void on account of fraud practiced by the purchaser cannot be validated by the legislature. It does not come within the principle of that class of cases in which a legislature has been held to have the power to confirm by retroactive laws the acts of public officers, who have exceeded or imperfectly executed their authority.² The supreme court of North Dakota refused to concede the validity of a statute curing the failure to give notice of a mortgage foreclosure sale for the full time prescribed by the statute, and rested its denial upon the general proposition that a curative statute would be permitted to operate only when injustice would not result from denying its operation, saying: “While fully recognizing the power of the legislature to cure defects which it is unjust for one to take advantage of, we do not believe that this case falls within the rule. There is no injustice in the mortgagor insisting that the full statutory notice be given. The law threw about him the protection of full forty-two days’ notice, and to have insisted on it at any time before the enactment of this new act would have involved no injustice to the purchaser. The latter would have been subrogated to the rights of the mortgagee, and the mortgagor, despite his successful assault upon the sale, must have paid the mortgage debt. The mortgage would still have been a lien on the property. So far as the sale might have resulted in a surplus, so that subrogation of the purchaser to the rights of the mortgagee would not afford him full protection, the mortgagor would be obliged to refund to the purchaser such surplus, as a condition of annulling the sale. The case is not like the case of a defective deed or a defective acknowledgment, the purchaser having paid full value for the property. Nor is it analogous to the case

¹ Dale v. Medcalf, 9 Pa. St. 110. See, also, Orton v. Noonan, 23 Wis. 102.

² White Mts. R. R. v. White Mts. R. R., 50 N. H. 56.

of a contract which a party ought in conscience to perform, although holding in his grasp against it some technical defense, as that she was a married woman, or that the agreement was not in writing. In these cases, the court answers the argument that the legislature cannot disturb vested rights by the conclusive reply that no one has a vested right to be unjust, or to do a moral wrong. We have carefully examined the whole law on this subject of curative legislation, and we have been unable to find an adjudication which has taken a position so extreme as we would be compelled to take, should we allow this statute to have a retroactive effect, and thus validate an absolutely void sale, it not being abhorrent to natural justice for the owner of the property, under the circumstances of this case, to insist upon his strict legal rights. We do not lay so much stress on the fact that the foreclosure sale was absolutely void, for we think that even when a proceeding of any kind is void, with the exception of a judicial proceeding void for want of jurisdiction, it is nevertheless within the power of the legislature to validate such proceeding by retroactive legislation, if it would be grossly unjust for the person against whom the healing law is directed to insist upon his purely technical rights, destitute of all equity. But the case should be a clear one. Nothing short of this should prompt a court to sustain such a law. All jurists agree that this power, while highly beneficial when kept within proper limits, is liable to great abuse; and, while some of the cases have given it very wide scope, yet the unmistakable trend both of recent judicial decisions and of recent constitutional changes is in the direction of strictly limiting this power.”¹

§ 60. **Informalities may be Waived by Subsequent Curative Acts.**—Where a sale is void for some defect in the proceedings, not jurisdictional in its character, it may, in most States, be validated by a subsequent curative act of

¹ *Finlayson v. Peterson*, 5 N. D. 587, 57 Am. St. Rep. 584.

the legislature.¹ Hence, acts have been adjudged to be constitutional which validated sales which were void because made in violation of the appraisement laws,² or based on defective levies or returns,³ or on charges of unlawful or excessive fees,⁴ or made by an officer of another bailiwick from that in which the lands sold were situate.⁵ In the opinion of Judge Cooley, "the rule applicable to cases of this description is substantially the following: If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something, the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law." ⁶ A par-

¹ *Lane v. Nelson*, 79 Pa. St. 407; *Boyce v. Sinclair*, 3 Bush, 261; *Beach v. Walker*, 6 Conn. 197; *Booth v. Booth*, 7 Conn. 350; *Wildes v. Vanvoorhis*, 15 Gray, 139; *Brickhouse v. Sutton*, 99 N. C. 103, 6 Am. St. Rep. 497.

² *Davis v. State Bank*, 7 Ind. 316; *Thornton v. McGrath*, 1 Duv. 349; *Boyce v. Sinclair*, 3 Bush, 261.

³ *Mather v. Chapman*, 6 Conn. 54; *Norton v. Pettibone*, 7 Conn. 319, 18 Am. Dec. 116.

⁴ *Booth v. Booth*, 7 Conn. 350.

⁵ *Menges v. Wertman*, 1 Pa. St. 218, overruled; *Menges v. Dentler*, 33 Pa. St. 495, 75 Am. Dec. 616.

⁶ *Green v. Abraham*, 43 Ark. 420; *Johnson v. Commrs.*, 107 Ind. 15; *Gordon v. San Diego*, 101 Cal. 522, 40 Am. St. Rep. 73; *Richman v. Supervisors*, 77 Iowa, 513, 14 Am. St. Rep. 308; *Cooley's Const. Litr.* 371. Hence, deeds not executed in the mode prescribed by statute, may be validated by a statute passed subsequently to their execution. *Watson v. Mercer*, 8 Pet. 88; *Chestnut v. Shane's Lessee*, 16 Ohio. 599, 47 Am. Dec. 387; *Newman v. Samuels*, 17 Iowa, 528; *Shonk v. Brown*, 61 Pa. St. 327; *Dulany v. Tilghman*, 6 G. & J. 461; *Journeay v. Gibson*, 56 Pa. St. 57; *Dentzel v. Waldie*, 30 Cal. 138; *Sidway v. Lawson*, 58 Ark. 117; *Williamson v. Lazarus*, 66 Ark. 226, 74 Am. St. Rep. 91; *Wistar v. Foster*, 46 Minn. 484, 24 Am. St. Rep. 241; *Shrawder v. Snyder*, 142 Pa. St. 1. *Contra*: *Pearce v. Patton*, 7 B. Mon. 162, 45 Am. Dec. 61; *Russell v. Rumsey*, 35 Ill. 362; *Ala. L., I. & T. Co. v. Boykin*, 38 Ala. 510.

tition sale was made to a company of persons, but the deed, by their consent, was made to one only, for convenience of selling and conveying. The deed was invalid because it did not follow the sale and order of confirmation. An act was subsequently passed providing that, on satisfactory proof being made to a court or jury that the lands were fairly sold, in good faith and for a sufficient consideration, the deed should be held valid. This act was held free from constitutional objections.¹ In Massachusetts, an act confirming deeds made by certain executors was held valid, though they "had not previously been appointed and given bond in such a manner as to authorize them to execute the power of sale conferred by the will."² But in this case the heirs at law of the testator released all their interest in the lands at the time the executor's deed was executed. An extreme case is that of *Selsby v. Redlon*.³ Justices' courts were authorized to issue executions at any time within two years after the entry of judgment. Nevertheless, under a misapprehension of the law, the practice prevailed, to a considerable extent, of issuing such writs at any time within five years. The legislature passed an act confirming and validating proceedings taken under writs issued more than two years after the entry of judgment. "Was it competent for the legislature, so far as the time of issuing was concerned, to enact that all executions upon judgments of justices of the peace theretofore issued after the expiration of two, but before the lapse of five, years from the time the judgments were rendered, should be deemed valid and regular? It seems to me that it was, and that the act operated at once upon all such executions, the invalidity of which had not already been adjudged by some competent court of law or equity. I had occasion to examine the question, and some of the leading authorities upon it, in *Hasbrouck v. Milwau-*

¹ *Kearney v. Taylor*, 15 How. (U. S.) 494.

² *Weed v. Donovan*, 114 Mass. 183.

³ 19 Wis. 17.

kee,¹ and deem it unnecessary to add to what is there said. It appears to me, in the language of Chancellor Kent, to be one of those remedial statutes, not impairing contracts or disturbing absolute vested rights, but going only to confirm rights already existing, and in furtherance of the remedy, by curing defects and adding the means of enforcing existing obligations, the constitutionality of which has always been upheld. The validity of the judgment is not questioned, and the obligation of the debtor to pay not denied. After the execution was issued and the judgment satisfied, the question was whether such satisfaction should stand, and the creditor retain what in justice and equity belonged to him, or whether he should make restoration to his debtor, and be put to a new action to recover his debt. I think an act to relieve debtors in such cases to be not only just and reasonable, but that it is liable to no constitutional objection.”²

Curative statutes may undoubtedly destroy the force of an objection founded on a mere informality; and according to many of the authorities a matter may be regarded as a mere formality, within the meaning of this rule, if the legislature might, in the first instance, have authorized its omission. Thus, the legislature may unquestionably provide that judgments need not be signed by the judge, or may be entered on a written waiver of service of summons. Hence, it may make valid judgment not so signed,³ or founded on such waiver of service.⁴ It has also been held that a sale, made by a foreign executor, vested with a power of sale by the will, though void when made, because not ordered nor approved by the court, may be validated by subsequent statute, if the right to sell was not dependent on anything but the judgment of the executor, and the sale must there-

¹ 13 Wis. 50, 80 Am. Dec. 718.

² *Selsby v. Redlon*, 19 Wis. 21.

³ *Cookerly v. Duncan*, 87 Ind. 332.

⁴ *Muncie Bank v. Miller*, 91 Ind. 441.

fore have inevitably been ordered and approved, had proper application been made.¹

§ 61. **Limitation on Effect of Curative Statutes.**—Even in those States where the validity of curative statutes is conceded, their operation is usually limited to the original parties. If a defendant whose property has been so irregularly sold under execution that his title is not divested, sells to a purchaser in good faith, and for value, the title of the latter is regarded as a vested right, which cannot be divested by a subsequent statute. The same rule usually prevails in regard to all legislation enacted for the purpose of confirming deeds which are invalid for some informality. The curative act does not operate against purchasers from the grantor in good faith, and for value, before its passage.² The operation of curative acts has also been denied where the proceedings had been, prior to the passage of the act, pronounced void by the judgment of a court of competent jurisdiction;³ and, in Maine, curative acts do not operate to change the result of suits previously pending.⁴

§ 62. **General Reflections Concerning Curative Statutes.**—It must, we suppose, be conceded that, prior to the adoption of the fourteenth amendment, there was no provision in the constitution of the United States which prohibited the State legislatures from enacting curative statutes validating prior judicial sales and proceedings. The provision of sec. 10, art. 1, forbidding States from passing *ex post facto* laws, applies exclusively to criminal matters and proceedings, and does not inhibit retrospective legislation

¹ *Smith v. Callighan*, 66 Iowa, 562. In *Forster v. Forster*, 129 Mass. 559, it was decided that a tax sale, void for want of notice of sale, cannot be made valid by statute.

² *Newman v. Samuels*, 17 Iowa, 528; *Brinton v. Seevers*, 12 Iowa, 389; *Thompson v. Morgan*, 6 Minn. 292; *Sherwood v. Fleming*, 25 Tex. Supp. 408; *Wright v. Hawkins*, 28 Tex. 452; *Menges v. Dentler*, 33 Pa. St. 495, 75 Am. Dec. 616, overruling *Menges v. Wertman*, 1 Pa. St. 218.

³ *Mayor v. Horn*, 26 Md. 194.

⁴ *Adams v. Palmer*, 52 Me. 480.

in civil matters.¹ The same section also provides that no State shall pass any "law impairing the obligation of contracts." The word contracts is sufficiently comprehensive to embrace conveyances. Hence, a State legislature cannot annul or diminish the effect of a valid conveyance.² But the federal constitution, while it prohibited the impairing of valid contracts, did not inhibit the validation of void contracts, nor the creation of obligations;³ nor did it prevent the State legislatures from divesting vested rights in any case where they could do so without impairing the obligation of some pre-existing contract.⁴ The fifth amendment to the constitution of the United States declares that "no person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." The prohibitions contained in this amendment are addressed to the federal legislature, and do not operate as limitations of the powers of any of the State legislatures.⁵ One of the guarantees contained in the fourteenth amendment is as follows: "Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person, within its jurisdiction, the equal protection of the laws." This provision, in the language of Chief Justice Waite, speaking for the supreme court of the United States, "adds nothing to the rights of one citizen against another.

¹ Story on the Const., secs. 1345, 1398; *State v. Squires*, 26 Iowa, 340; *Watson v. Mercer*, 8 Pet. 88; *Carpenter v. Pennsylvania*, 17 How. (U. S.) 456; *Calder v. Bull*, 3 Dall. 386.

² Story on the Const., sec. 1376; *Fletcher v. Peck*, 6 Cranch, 137; *People v. Platt*, 17 Johns. 195; *Grogan v. San Francisco*, 18 Cal. 590; *Louisville v. University*, 15 B. Mon. (Ky.) 642.

³ Story on the Const., sec. 1398; *Satterlee v. Mathewson*, 2 Pet. 380; *Mutual B. I. Co. v. Winne*, 20 Mont. 40; *Ewell v. Daggs*, 108 U. S. 151; *Gross v. Mortgage Co.*, 108 U. S. 488.

⁴ Story on the Const., sec. 1398; *Satterlee v. Mathewson*, 2 Pet. 380; *Calder v. Bull*, 3 Dall. 386; *Freeland v. Williams*, 131 U. S. 415. *

⁵ *Barron v. Mayor of Baltimore*, 7 Pet. 243; *Withers v. Buckley*, 20 How. (U. S.) 84.

It simply furnishes an additional guarantee against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.”¹ But whether this amendment may, in any case, operate as a prohibition against curative laws passed by the States is, perhaps, an immaterial inquiry, for the reason that most, if not all, of the State constitutions, contain limitations which, in substance, withhold the right to deprive any person of his property without due process of law.

Those curative acts which impart validity to judicial or execution sales otherwise void, necessarily result in the transfer of one person's property to another, without the assent of the former. Before the passage of the act, property belonged to A. After its passage, the same property, without any act on the part of A or B, and solely through the operation of the curative statute, is vested in the latter. Such a statute cannot be maintained on the ground that it is a judicial determination, that the title of B is paramount to that of A, for the State constitutions prohibit the legislatures from exercising judicial functions. These constitutions also protect vested rights and prohibit the taking of property from one person and giving it to another, at least in all cases where there has been no resort to due process of law.² But the words “property” and “vested rights,” within the meaning of these constitutions, are difficult of definition. They seem not to refer to the legal title merely—not to insure to a man that which at law belongs to him, but which in equity belongs to another. The most justifiable curative legislation is that which does no more than to

¹ *United States v. Cruikshank*, 92 U. S. 542, 3 Cent. L. J. 295, 8 Ch. L. N. 233. See *City of Portland v. City of Bangor*, 65 Me. 120, 3 Cent. L. J. 651.

² *Cooley's Const. Lim.*, ch. xi. To ascertain the meaning of “due process of law,” and of equivalent terms, see *Ib.*; *Kennard v. Louisiana*, 92 U. S. 480, 8 Ch. L. N. 329; *Walker v. Sauvinet*, 3 Cent. L. J. 445, 92 U. S. 90; *Murray v. Hoboken L. & I. Co.*, 18 How. (U. S.) 272; *Story on the Const.*, sec. 1944.

give a legal sanction to a title which was theretofore good in equity.¹ So, it is said, legislatures may transmute a moral into a legal obligation;² and that "a party has no vested right in a defense based upon an informality not affecting his substantial equities;"³ that "courts do not regard rights as vested contrary to the justice and equity of the case;"⁴ that "a party cannot have a vested right to do a wrong;"⁵ that "the rules which determine the legislative power in such cases are broad rules of right and justice."⁶ So, after all, the limitations inserted in the fundamental laws are so construed that their application depends, not on settled principles, but upon notions of right and justice. A man's title may be perfect at law. It may also be unsalable in equity. He has, nevertheless, no vested right in it which he may hold paramount to legislative control, unless, in addition to his perfect title at law and in equity, his title also meets the approval of the judge before whom it is questioned; the latter, in withholding or granting such approval, being governed by certain rules of right and justice existing in his own conscience, but not susceptible of that accurate description which would enable us to recognize them in the future, and rely on them for our protection and guidance. Such, at least, seems to be the result of the weight of the authorities.

With respect to curative acts affecting judicial and execution sales, two rules are commonly put forth as tests of their constitutionality. The first is, that what the legislature could have dispensed with before the sale it may dispense with afterwards;⁷ and the second is, that courts do not regard rights as vested contrary to the justice and equity of

¹ *Chestnut v. Shane*, 16 Ohio, 599, 47 Am. Dec. 387.

² *Weister v. Hade*, 52 Pa. St. 480.

³ *Cooley's Const. Lim.* 370.

⁴ *State v. Newark*, 3 Dutch. 197.

⁵ *Foster v. Essex Bank*, 16 Mass. 245.

⁶ *Story on the Const.*, sec. 1958.

⁷ *Cooley's Const. Lim.* 371; *Ferguson v. Williams*, 58 Iowa, 717.

the case, but will determine the legislative power on broad rules of right and justice. Neither rule has been universally accepted and followed. Thus, though a statute may unquestionably authorize property to be sold for taxes, without the aid of any judicial proceedings whatever, yet where such proceedings were required, and were so prosecuted as to be void for want of jurisdiction over the defendant, it was held that they could not be made valid by subsequent legislation.¹ So, while legislatures may authorize guardians and others to sell property belonging to persons not *sui juris*, without applying to court for authority so to do, yet where such applications are required to be made to some court, and the proceedings of such court are void for want of jurisdiction, they cannot be subsequently made valid.² If the rights of one whose property has been sold at a void sale are not to be regarded as vested except when, "upon broad rules of right and justice," they should be so regarded, then the distinction between jurisdictional and other defects is immaterial. For it may be, and frequently is, as unjust to urge a jurisdictional defect, as it is to urge some other irregularity, such, for instance, as the omission to give notice of the sale. In the first case the sale may have been fair, a good price realized, and the proceeds applied to pay the debts of the defendant; while, in the second case, the property may have been sacrificed for want of the notice of the sale. If void judicial or execution sales may be made valid, it would seem to be on the ground that the purchaser, by the payment of the money and its application to the benefit of the defendant, obtained an equity which the legislature might recognize and transform into a legal title;³ that, in such a case, the person whose property was sold has left to him, after the sale and conveyance, a mere technical and unconscionable defense; and that, in such a

¹ *Nelson v. Rountree*, 23 Wis. 367.

² See *ante*, sec. 58.

³ *Thornton v. McGrath*, 1 Duv. 355.

defense, there can be no vested right. But this view of the question is not invariably correct nor necessarily conclusive. In the first place everybody is conclusively presumed to be acquainted with the law. It cannot, therefore, be expected that a sale, made in such a manner as to be inoperative under the then existing law, will realize a fair price. Many persons must be deterred from bidding, because they know or suspect that the sale is invalid. He who purchases must be taken to act with his eyes open, and as bidding for a mere chance, rather than for an unquestionable title. All this is equally true, whether the defect be that the judgment is void, or that the sale is invalid from some other vice. He whose property is sacrificed against his will, by being exposed to the hazard of a void sale, has, even in the broad rules of right and justice, rights as sacred as those of the speculating purchaser. The latter is a mere volunteer, risking his money in defiance of the law. He is not imposed on in any manner, nor is there any contract between him and the owner of the property to urge by way of estoppel. But if an execution or judicial sale is void at law, it is usually equally void in equity. The purchaser has no title which is recognized in any prevailing system of law. The judgment debtor is under no obligation which will warrant any court in compelling him to convey or surrender his property to the purchaser. Why should not those rights which confer a perfect title to property, both at law and in equity, be held to be vested rights? If such rights are not vested, then what additional claim to protection must the owner of property have before his rights become vested? Must he have a moral right or title? and, if so, what does the word moral mean in this connection? Has it some definite signification? or must it, for all the practical purposes of litigation, vary so as to correspond with the moral perceptions of the different judges? In pronouncing the opinion of the supreme court of California, in an action wherein an heir had sued to recover his inheritance, Mr.

Justice McKinstry very forcibly said: "As to any vague, indeterminate and indeterminable 'moral equity,' if any such exist, it may well be doubted whether we can recognize such, since the courts have no standard by which to estimate its sufficiency or effectiveness. Even if we could adopt, however, the measure of rights suggested by some of the cases, we are not prepared to hold that the plaintiff in this action may not insist upon his complete legal and equitable title, without violating any principle of morality.¹ Admitting that the estate of the ancestor comes to the heir burdened with the debts of the former, it is still the right of the latter, when courts are organized, or are required by the constitution to be organized, for the settlement of the estates of decedents, to have the debts ascertained and the property applied by a tribunal of competent jurisdiction. And, upon any theory, the doctrine of estoppel, which is claimed to impose an imperfect duty capable of being ripened into a perfect obligation by the legislative will, can have no application, unless a party, by his own contract or other voluntary act, has placed himself in such an attitude that it would be a violation of sound morality on his part for him to adhere to and insist on his legal and equitable rights. It ought not to be made to apply to this plaintiff merely because he was a party, as an infant, to a pretended legal proceeding."²

¹ 8 Gill, 299.

² Pryor v. Downey, 50 Cal. 403, 19 Am. Rep. 656.

CHAPTER VII.

CONSTITUTIONALITY OF SPECIAL STATUTES AUTHORIZING
INVOLUNTARY SALES.

SECTION.

63. General Nature of Legislative Sales, and of the Special Acts under which they are Made.
64. Of the Power of the Legislature to Provide for the Involuntary Sale of Property.
65. The Constitutionality of Special Laws Authorizing the Sale of Property Denied.
66. The Constitutionality of Special Laws Authorizing the Sale of Property Sustained.
67. Acts Authorizing Sales by Administrators, Constitutionality Affirmed.
68. On Whom Power of Sale may be Conferred by Special Acts.
69. Of Special Acts Authorizing the Sale of Lands to Pay Debts.
70. Special Act need not Require a Bond for the Application of the Proceeds.
71. Acts Authorizing the Sale of the Lands of Co-tenants.
72. Decisions Limiting the Power of Legislatures to Pass Special Laws for the Sale of Property.

§ 63. **General Nature of Legislative Sales and of the Special Acts under which they are Made.**—A question very closely allied with judicial sales, is that of involuntary sales made by authority of the legislature, without the assent of the owner of the property, and in the absence of any judicial declaration concerning the necessity or propriety of the sale. Many special statutes have been enacted purporting to confer authority on guardians, administrators, trustees and other persons to sell and convey the estates of their

wards, or of minor heirs, or of other *cestuis que trust*. Sometimes entire strangers have been appointed as commissioners and invested with powers of sale. Generally, in statutes of this character, the legislature assumes the existence of a state of facts, making a sale either necessary or expedient; and, therefore, empowers some one to make a sale, either according to his discretion, or in the manner and under the circumstances designated in the special statute. Frequently bonds are exacted for the purpose of avoiding the misappropriation of the funds to be realized. Often a report of the sale is required to be made to some judicial tribunal. The functions of this tribunal are usually restricted to inquiring and determining whether the sale has been conducted in conformity with the special act. Whether the sale is required to be *confirmed* by some court or not, it is evident that the authority for selling is purely legislative. This class of sales may, therefore, be styled "legislative sales."

§ 64. **Of the Power of the Legislature to Provide for the Involuntary Sale of Property.**—There can be no question of the authority of the legislature, by general laws, and in proper cases, to authorize the compulsory alienation of real and personal property. The power of the English parliament is absolute. It can regulate the succession to the crown, or alter the established religion of the land. Theoretically, at least, it has uncontrovertible dominion over both persons and property. Hence, it is no cause for wonder that "private acts of parliament" are recognized as among the "assurances by matter of record." In this country, however, the legislature of every State possesses an authority much more restricted than that of parliament. In none of our courts would a statute purporting to take property from one person and vest it in another be treated with any respect. The constitutions of most, and, perhaps, of all of our States, vest the legislative and the judicial functions of government in separate tribunals, and forbid

either tribunal from encroaching upon the jurisdiction of the other. Hence, a statute professing to determine conflicting claims of title, would be as inoperative as a statute directly transferring title from one person to another. But every legislature possesses powers under which it may enforce the collection of debts, provide for the management of the property of persons incapable of caring for themselves, and also for the partition of estates held in co-tenancy. The exercise of these powers often involves the compulsory sale of property. Before a debt can be collected by legal compulsion, its existence must be determined. This determination can be made only by some *judicial* authority. Hence, a statute declaring that A is indebted to B, or that the lands of A shall be sold to pay the debts owing from him to B, is unquestionably void, unless the legislature enacting it was competent to exercise judicial functions, or the existence of the debt from A to B is settled by some judicial tribunal. So if A should die, his heirs would unquestionably succeed to his estate, subject to the right of his creditors to enforce their claims against the estate; and also subject, in case of the minority or other incapacity of the heirs, to the power of the government to make the estate contribute to their education or support. But the existence of debts against A could, during his lifetime, be established only by judicial inquiry. Does this inquiry become any less judicial or any more legislative in its nature by reason of A's death? So, in the event that the minor or other heirs of A are alleged to be in circumstances in which the sale of their estate is either essential to their support, or highly beneficial to their interests, the truth of the allegation ought to be determined in some manner; and this determination, if it does not invariably call for the exercise of judicial functions, can unquestionably be most satisfactorily accomplished through their aid. Hence, the compulsory sale of property is usually governed by general laws, under which the necessity and

expediency of the sale are made the subject of judicial inquiry, and the authority to proceed depends upon the judgment or order of some judge or court. Any departure from these general laws is fraught with great danger, and is likely to result in inconsiderate action, if not in unmitigated plunder. Hence, in nearly one-half of the States of this union, constitutional provisions directly inhibit special laws licensing the sale of the lands of minors and other persons under legal disability.¹

§ 65. The Constitutionality of Special Laws for the Sale of Property Denied.—In those States whose constitutions do not directly forbid the enactment of special laws authorizing one person to sell the property of another, such laws have, when drawn in question before the courts, been assailed: 1st, as contravening the spirit of constitutional provisions, requiring all laws of a general nature to have a uniform operation; 2d, as in opposition to that provision of the constitution of the United States, which is also incorporated in most of the State constitutions, that no person shall be deprived of life, liberty or property without due process of law;² and, 3d, as involving the exercise of judicial functions not possessed by the legislature.

The house of representatives of the State of New Hampshire, in June, 1827, asked the judges of the supreme court of judicature of that State the following question: "Can the legislature authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards?" The judges answered as follows: "The

¹ Cooley's Const. Lim. (3d Ed.), p. 107, note.

² This provision may be found in both the fifth and the fourteenth amendments to the constitution of the United States. As employed in the former, it is a limitation on the powers of the general government only. In the latter amendment, it is designed as a limitation on the powers of the States. *Barron v. Mayor of Baltimore*, 7 Pet. 243; *Withers v. Buckley*, 20 How. (U. S.) 84; *United States v. Cruikshank*, 92 U. S. 542, 3 Cent. L. J. 295, 8 Ch. L. N. 233. See *City of Portland v. City of Bangor*, 65 Me. 120, 3 Cent. L. J. 651.

objection to the exercise of such a power by the legislature is, that it is in its nature both legislative and judicial. It is the province of the legislature to prescribe the rule of law; but to apply it to particular cases is the business of the courts of law. And the thirty-eighth article in the bill of rights declares that, ‘in the government of this State, the three essential powers thereof, to-wit: the legislative, executive and judicial ought to be kept as separate from, and independent of, each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.’ The exercise of such a power by the legislature can never be necessary. By the existing laws, judges of probate have very extensive jurisdiction to license the sale of the real estate of minors by their guardians. If the jurisdiction of the judges of probate be not sufficiently extensive to reach all proper cases, it may be a good reason why that jurisdiction should be extended, but can hardly be deemed a sufficient reason for the particular interposition of the legislature in an individual case. If there be a defect in the laws they should be amended. Under our institutions all men are viewed as equal, entitled to enjoy equal privileges, and to be governed by equal laws. If it be fit and proper that license should be given to one guardian, under particular circumstances, to sell the estate of his ward, it is fit and proper that all other guardians should, under similar circumstances, have the same license. This is the very genius and spirit of our institutions. And we are of opinion that a particular act of the legislature to authorize the sale of the land of a particular minor, by his guardian, cannot be easily reconciled with the spirit of the article in the bill of rights just cited.

“It is true that the grant of such a license by the legislature to the guardian is intended as a privilege and benefit to the ward. But, by the law of the land, no minor is capa-

ble of assenting to a sale of his real estate in such a manner as to bind himself. And no guardian is permitted, by the same law, to determine when the estate of his ward ought and when it ought not to be sold. In the contemplation of the law, the one has not sufficient discretion to judge of the propriety and expediency of the sale of his estate, and the other is not to be intrusted with the power of judging. Such being the general law of the land, it is presumed that the legislature would be unwilling to rest the justification of an act authorizing the sale of a minor's estate upon any assent which the guardian or the minor could give to the proceeding.

“The question, then, is, as it seems to us, can a ward be deprived of his inheritance, without his consent, by an act of the legislature, which is intended to apply to no other individual? The fifteenth article in the bill of rights declares that no subject shall be deprived of his property ‘but by judgment of his peers or the law of the land.’ Can an act of the legislature, intended to authorize one man to sell the land of another without his consent, be ‘the law of the land,’ within the meaning of the constitution? Can it be ‘the law of the land’ in a free country? If the question proposed to us can be resolved into these questions, as it appears to us it may, we feel entirely confident that the representatives of the people of this State will agree with us in the opinion we feel ourselves bound to express on the question submitted to us: That the legislature cannot authorize the guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards.”¹

The supreme court of the State of Tennessee, in the year 1836, delivered an opinion in full accord with that of the judges of New Hampshire. In 1825, the legislature of the first named State passed an act authorizing the guardians of certain minors therein specified to sell certain lands in the

¹ Opinion of the Judges, 4 N. H. 572.

best manner they could, and declaring that the assets to be produced by such sale should be assets for the payment of the debts of the ancestor of the minors. Under this act a sale was made. Some years afterwards a bill was brought by the minors against the grantee of the purchaser, to recover possession of the lands sold, and also for an accounting for the rents and profits. The legislative sale was adjudged void, because it deprived the minors of their property without due process of law, and because the act purporting to authorize it was a usurpation of the authority of the judiciary.¹

§ 66. **The Constitutionality of Special Laws Authorizing Sales Sustained.**—Notwithstanding the decisive stand taken by the courts of New Hampshire and Tennessee against special statutes authorizing sales by guardians, such statutes have been sustained in other States so frequently, and in such varying circumstances, that their constitutionality is now almost free from doubt. In 1792, Asaph Rice, by a resolve of the general court of the commonwealth of Massachusetts, was authorized to sell and convey certain real estate, of which he was tenant by curtesy, and of which his children were seized in fee of the remainder expectant on the death of their father. A sale was made by virtue of the authority conferred by this resolve. After the death of the father, the children, by a writ of entry, sought to recover their inheritance. Parker, C. J., delivered the opinion of the court, in the course of which he said: “If the power by which the resolve authorizing the sale in this case was passed were of a judicial nature, it would be very clear that it could not have been exercised by the legislature without violating an express provision of the constitution. But it does not seem to us to be of this description of power; for it was not a case of a controversy between party and party; nor is there any decree or judgment affecting

¹ Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 430.

the title to property. The only object of the authority granted by the legislature, was to transmute real into personal estate, for purposes beneficial to all who were interested therein. This is a power frequently exercised by the legislature of this State, since the adoption of the constitution, and by the legislatures of the province and of the colony while under the sovereignty of Great Britain, analogous to the power exercised by the British parliament, time out of mind. Indeed, it seems absolutely necessary for the interest of those who, by the general rules of law, are incapacitated from disposing of their property, that a power should exist somewhere to convert lands into money. For otherwise minors might suffer, although having property, it not being in a condition to yield an income. This power must rest in the legislature of this commonwealth, that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves. It was undoubtedly wise to delegate the authority to other bodies, whose sessions are regular and constant, and whose structure may enable them more easily to understand the merits of the particular applications brought before him. But it does not follow that, because the power has been delegated by the legislature to courts of law, it is judicial in its character. For aught we see, the same authority might have been given to the selectmen of each town, or to the clerks or registers of the counties, it being a mere ministerial act, certainly requiring discretion, and sometimes knowledge of the law for its due exercise, but still partaking in no degree of the characteristic of judicial power. No one imagines that, under this general authority, the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those who properly represent him, if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and con-

venient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the legislature is bound to do, and enabling him to derive subsistence, comfort and education from property which might otherwise be wholly useless during that period of life when it might be most beneficially employed."¹ If it be conceded that an infant, lunatic or other person, incompetent to act for himself, is in need of ready money for his sustenance, or for any other pressing necessity, of course the conversion of his estate into money would be authorized by any tribunal having competent authority. Legislative licenses authorizing a sale under such circumstances are generally sustained.² Nor is any necessity required to support the exercise of this legislative authority. It seems to be sufficient that the sale is one to which the incompetent person might, if *sui juris*, probably give his assent. Hence, a special statute may be supported if, without any apparent necessity, it sanctions the conversion of real into personal estate. This conversion is presumed to be beneficial to the minor, or, at least, not to be a destruction of his rights of property.³ Acts have been sustained which authorized guardians to convey lands sold by the ancestor of their wards;⁴ or which empowered the guardian of a lunatic to sell the lands of the latter to pay off an incumbrance thereon;⁵ or which authorized guardians to convey real estate for the purpose of effecting a compro-

¹ Rice v. Parkman, 16 Mass. 329.

² Stewart v. Griffith, 33 Mo. 23, 82 Am. Dec. 148; Davidson v. Koehler, 76 Ind. 412; Hoyt v. Sprague, 103 U. S. 613.

³ Carroll v. Olmstead, 16 Ohio, 251; Dorsey v. Gilbert, 11 G. & J. 87; Davis v. Helbig, 27 Md. 452, 92 Am. Dec. 646; Thurston v. Thurston, 6 R. I. 296; Snowhill v. Snowhill, 3 N. J. Eq. 20; Brenham v. Davidson, 51 Cal. 352; Soheir v. Mass. Gen. Hospital, 3 Cush. 483; Norris v. Clymer, 2 Pa. St. 284; Clark v. Van Surley, 15 Wend. 436; Clusky v. Burns, 120 Mo. 567; Ebling v. Dryer, 149 N. Y. 460.

⁴ Estop v. Hutchman, 14 S. & R. 435.

⁵ Davidson v. Johonot, 7 Met. 388, 41 Am. Dec. 448.

mise with persons claiming adversely to the minors.¹ The case last cited determined the constitutionality of an act passed by the legislature of Missouri in the year 1847. This act recited that certain adverse claims existed to a tract of land in the city of St. Louis; that the parties in interest had agreed upon a compromise, to accomplish which mutual deeds of quitclaim were essential; and then the act authorized the guardians of designated minors to execute the conveyances necessary to consummate the compromise. Such a conveyance was executed, and was upheld, though it was subsequently ascertained that the minor's title was valid, and that of the adverse claimants unfounded—the court saying: “It is a question of power, and whilst it is conceded that the legislature has no power to transfer A's property to B, or to authorize anyone else to do so—supposing A and B to be adults and competent to transact their own affairs—the legislature may authorize the guardian, father or mother of a lunatic, infant or idiot, to transfer the estate of the minor, lunatic or idiot. It will be observed that the title of Pelagie, and her daughter Antoinette, was a disputed one. That the claimants under Mackay and Rutgers really had no valid title is not important. This was ascertained after the decision of this court, in the case of Norcum v. D'Oench, but it was a matter of conjecture before. The adults had an undoubted right to compromise. If the legislature has power to authorize third persons, guardians, fathers, mothers, etc., to convey the undisputed title of an infant, without regard to insuring the proceeds for the benefit of the infant, why should they be deprived of the right to authorize the compromise of an unsettled claim.”² “The doctrine is firmly established by the great weight of American decisions, and sustained by the most cogent and unanswerable reasoning, that special acts of the legislature authorizing or confirming sales of lands by guard-

¹ Thomas v. Pullis, 56 Mo. 217.

² *Ibid.*

ians are constitutional when their object is simply to provide a change of investment, and not to divest the beneficiary of property rights, and in the absence of special or exceptional constitutional limitations, and that such acts are not judicial, but the proper exercise of a legislative power. Such a power necessarily resides in the legislative department of the government, as *parens patriæ*, to prescribe such rules and regulations as may be proper for the management, superintendence, and disposition of the property of infants, lunatics, and persons who are incapable of managing their own affairs.”¹ If in the exercise of the power of eminent domain, it is necessary to acquire property belonging to an infant, the legislature may, either by general or special law authorize his guardian to sell and convey such property.²

Though homestead property is deemed to be vested in the husband and wife as joint tenants, the legislature may, if either becomes hopelessly insane, authorize the probate court of the county in which the property is situate, upon the application of the sane spouse, to sell, convey, or mortgage such property. Such a statute “is a general remedial law intended to enforce the legal obligation of a hopelessly insane husband or wife to apply his or her property, in case of necessity, to the support of the sane husband or wife and their minor children; and therefore is no more objectionable on constitutional grounds than would be a statute to enforce the performance of any other private or public obligation.” Nor does it constitute any sufficient objection to such statute on constitutional grounds that it fails to require of the sane spouse any bond or other security for the proper application of the proceeds of the sale.³

When contingent or uncertain interests are vested in

¹ Louisville, etc., Ry. Co. v. Blythe, 69 Miss. 939, 30 Am. St. Rep. 599.

² Hodgdon v. Southern P. Ry. Co., 75 Cal. 642; Ebling v. Dreyer, 149 N. Y. 460; Cluskey v. Burns, 120 Mo. 567.

³ Rider v. Reagan, 114 Cal. 667.

minors or may subsequently become vested in persons not in being, there is no doubt of the authority of the legislature, especially with the consent of the adults or persons in being, to authorize the sale of the property, and to convey title free of any interest vested in such minors or which might otherwise thereafter become vested in persons not in being.¹

§ 67. **Acts Authorizing Sales by Administrators; Constitutionality of, Affirmed.**—The cases cited in the preceding section affirmed the constitutionality of laws authorizing sales to be made by the guardians or parents of persons incapable of acting for themselves. We shall now refer to cases involving the legislative delegation of a like authority to administrators. The weight of the authorities is to the effect that the power may be conferred on an administrator as well as on a parent or guardian.² In considering the validity of a sale made under an act of this character, the supreme court of the United States said: “On principle, this proceeding is sustainable. On the death of the ancestor, the land owned by him descends to his heirs. But how do they hold it? They hold it subject to the payment of the debts of the ancestor in those States where it is liable to such debts. The heirs cannot alien the lands to the prejudice of creditors. In fact and in law they have no right to the real estate of their ancestor, except that of possession, until the creditors shall be paid. As it regards the question of power in the legislature, no objection is perceived to their subjecting the lands of the deceased to the payment of his debts, to the exclusion of his personal property. The

¹ *Matter of Field*, 131 N. Y. 184; *Ebling v. Dreyer*, 149 N. Y. 460; *Scales v. Curfman*, 53 S. W. Rep. 755 (Tenn. Ch. App.).

² *Doe v. Douglas*, 8 Blackf. 10, 44 Am. Dec. 732; *Kibby v. Chitwood*, 4 Mon. 91, 16 Am. Dec. 143; *Williamson v. Williamson*, 3 S. & M. 715, 745, 41 Am. Dec. 636; *Gannett v. Leonard*, 47 Mo. 205; *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 369, 415; *Herbert v. Herbert*, Breese, 354, 12 Am. Dec. 192; *Todd v. Flournoy*, 56 Ala. 99, 28 Am. Rep. 758; *Watson v. Oates*, 58 Ala. 647; *Tindal v. Drake*, 60 Ala. 170.

legislature regulates descents and the conveyance of real estate. To define the rights of debtor and creditor, is their common duty. The whole range of remedies lies within their province. They may authorize a guardian to convey the lands of an infant; and, indeed, they may give the capacity to the infant himself to convey them. The idea that the lands of an infant which descend to him, cannot be made responsible for the payment of the debts of the ancestor, except through the decree of a court of chancery, is novel and unfounded. So far from this being the case, no doubt is entertained that the legislature of a State have power to subject the lands of a deceased person to execution in the same manner as if he were living. The mode in which this shall be done is a question of policy, and rests in the discretion of the legislature. The law under which the lot in dispute was sold decides no fact binding on creditors or heirs. If the administratrix and Brown have acted fraudulently in procuring the passage of this act, or in the sale under it, relief may be given on that ground. But the act does nothing more than provide a remedy, which is strictly within the power of the legislature.”¹

§ 68. **On Whom Power of Sale may be Conferred by Special Acts.**—It does not appear to be necessary that the person authorized by a special act of the legislature to sell the property of another should be an administrator or guardian by regular appointment of the courts of the State where the sale is to be made, nor, indeed, that he should have any official character whatever,² nor that he should be a relative of the person for whom he is authorized to act. His authority rests on the special act, and not on his other relations with the incompetent person. The legislature of the State, wherein the land lies, may authorize its sale and

¹ *Watkins v. Holman*, 16 Pet. 62; *Clusky v. Burns*, 120 Mo. 567; *Cargile v. Fernald*, 63 Mo. 304.

² *Bruce v. Bradshaw*, 69 Ala. 360.

conveyance by an administrator residing and appointed in another State or by his attorneys.¹ In Kentucky an act was sustained which, after reciting that no one would administer upon the estate of a deceased person, appointed three commissioners with power to sell so much of such estate as should be necessary to pay his debts.² An act of the legislature of California, approved May 6, 1861, purported to authorize Mary Ann Paty Dayley, the mother and guardian of Francis William Paty, a minor, to sell any or all of his real estate. In November, prior to the passage of this act, Mrs. Dayley had been appointed guardian of her son by the probate judge of Plymouth county, in the State of Massachusetts. In May, 1856, she received a like appointment from the chief justice of the Hawaiian Islands. She was never appointed guardian in California. She made sales and conveyances under this act. These sales were declared void, not on the ground that the statute was unconstitutional, but because she had never been appointed guardian in California. "The statute," said the court, "does not purport, in any part of it, to nominate Martha Ann Paty Dayley guardian of the infant; it simply assumes that she is, or—when the sale shall be made—will be guardian of his estate; exercising the ordinary functions, and charged with the ordinary responsibilities of guardians. The power was given to her in her capacity as guardian, and not as an individual; as she failed to secure an appointment as guardian, the attempted sale was void."³ Frequently property is vested in trustees for the benefit of persons incapable of acting for themselves. When this is the case, the legislature may authorize sales and conveyances to the same extent as when property is in the hands of administrators or guardians. In 1802, Mary Clark devised certain lands to Benjamin Moore,

¹ *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 369, 415; *Watkins v. Holman*, 16 Pet. 25; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159.

² *Shehan's Heirs v. Barnett's Heirs*, 6 Mon. 593.

³ *Paty v. Smith*, 50 Cal. 159; *McNeil v. First Cong. Society*, 66 Cal. 105, 4 W. C. Rep. 424.

and two other persons, in trust: 1st, to receive the rents, issues and profits thereof, and pay the same to Thomas B. Clarke during his life; 2d, after the death of Thomas B. Clarke, to convey the premises to his lawful issue in fee; 3d, if he should not have lawful issue, then to convey the premises to Clement C. Moore. In 1814, the legislature, upon the petition of Thomas B. Clarke, and with the concurrence of the trustees named in the will, and of Moore, the contingent remainder-man, passed an act authorizing the sale of a portion of the real estate for the purpose of *creating an income* for the benefit and support of Thomas B. Clarke, his family and children; the principal, after his death, to be paid according to the trusts in the will of Mary Clarke. In 1815, a further act was passed reciting that Moore, the contingent remainder-man, had conveyed his interest to Thomas B. Clarke, and “authorizing Clarke to do and perform every act in relation to the property, which the act of 1814 had directed might be performed by trustees to be appointed by the chancellor; but no sale was to be made by Clarke until he procured the assent of the chancellor; and when a sale was made, the proceeds were to be invested, and an annual account of the *principal* rendered, but the *interest* Clarke was authorized to apply to *his own use and benefit, and for the maintenance and education of his children.*” Sales were made under these acts. The constitutionality of these acts was discussed in the highest courts of the State and of the nation, and was always sustained. It was held: 1st, that it was competent for the legislature to change the trustees appointed by the will of Mrs. Clarke, and to vest their powers in Thomas B. Clarke; 2d, that it was equally within the power of the legislature to provide for the sale of the interest of the children of Clarke, in order that they might at once have the benefit of the estate for their better support and education during the most helpless period of their lives.¹ The litigation arising

¹ Clarke v. VanSurlay, 15 Wend. 436; Leggett v. Hunter, 19 N. Y. 445.

under the will of Mrs. Clarke and these special acts of the legislature was carried on, in various courts and forms, during nearly half a century; and has occasioned the most exhaustive discussions, both of the power of the legislatures, by special acts, to authorize the sale of the property of persons incapable of acting for themselves, and of the nature and effect of such sales when conducted under the supervision of judicial authority.¹ The power which is competent to change trustees and provide for the sale of property in which infants are interested, can deal with like efficiency with property given for the purposes of charity;² or which is vested in trustees, or other persons, for the benefit of persons not *in esse*.³

In the case of *Lincoln v. Alexander*,⁴ the defendants sought to maintain their right to the possession of real property which had been distributed to plaintiffs by the probate court, by proving a sale to them by the plaintiff's mother, acting under the authority of a special statute directing her to make such sale, and to retain and use the proceeds for the maintenance of plaintiffs who were then minors. It appeared that, prior to the enactment of such statute, the stepfather of the minors had been appointed their guardian, and had assumed the management and taken possession of their estates. The plaintiffs recovered chiefly, we presume, on the ground that while there is a guardian fully competent to act, the legislature cannot, by special statute, divest him of his powers, or some portion thereof, and confer them on some other person, though there are

¹ *Clarke v. Van Surlay*, 15 Wend. 436; *Sinclair v. Jackson*, 8 Cow. 543; *Cochran v. Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570; *Williamson v. Berry*, 8 How. (U. S.) 495; *Towle v. Forney*, 14 N. Y. 423; *Williamson v. I. P. Congregation*, 8 How. (U. S.) 565; *Suydam v. Williamson*, 24 How. (U. S.) 427; *Williamson v. Ball*, 8 How. (U. S.) 566; *Williamson v. Suydam*, 6 Wall. 723.

² *Matter of Trustees N. Y. P. E. Pub. School*, 31 N. Y. 592; *Van Hoone, Petitioner*, 18 R. I. 389.

³ *Matter of Bull*, 45 Barb. 334; *Leggett v. Hunter*, 19 N. Y. 445.

⁴ 52 Cal. 485, 28 Am. Rep. 639.

intimations in the opinion that the sale of the property of minors cannot be authorized, in the absence of special circumstances, not here shown to exist. The court said: "In *Brenham v. Davidson*¹ the statute, which was under review in that case, conferred the power of sale on the guardian of the minor, and the sale was to be approved by the probate court. The proceeds of the sale were to be reinvested for the benefit of the minor; and, moreover, no sale was to be made unless the mother of the minor, who held an undivided interest in the property, united in the sale and conveyance. Under these circumstances, we held that the case was one not provided for by the general law regulating the sale of the estates of minors, and that in passing the statute the legislature did not attempt to exercise judicial powers; but that, as *parens patriæ*, it has the power by special act, in a case not provided for by the general law, to authorize the real estate of the minor to be converted into money by the guardian, if the probate court approves the sale. But, in the case at bar, the minors had a duly qualified and acting statutory guardian at the time of the passage of the special act, and the general law provided an appropriate method by which the probate court could order a sale of the real estate of the minors by the guardian, if a sale was necessary for their education and support. The special act conferred the power of sale, not upon the guardian, but upon the mother of the minors, who was not their guardian, and had no interest in the property. Nor were any conditions imposed upon her, except that she should first execute a bond, to be approved by the probate judge, conditioned that the proceeds of the sale should be appropriated to the support and educations of the minors; and that the sale should not be valid unless confirmed by the probate court previous to the execution of the deed. In treating of the rights and powers of statutory guardians of the estate of minors, Mr. Schouler, in his treatise on Domestic Relations (p. 471),

¹ 51 Cal. 352.

says: 'The recognized principle is, that such guardians have an authority coupled with an interest, not a bare authority;' and such we understand to be the well settled rule. The statute under consideration attempts to take the estate of the minors out of the hands of their guardian, and to withdraw it from the control of the probate court, which, under the general law, had ample authority to order it to be sold, and the proceeds to be applied to the support and education of the minors. It wholly ignores the rights and powers of the guardian, who had an authority *coupled with an interest*; withdraws the estate from the jurisdiction and control of the probate court, which that court might rightfully exercise under the general law; and attempts to substitute another person for the guardian, with authority to dispose of the estate absolutely, on no other conditions than those already mentioned. No adjudicated case has been called to our attention, in which the exercise of such a power by the legislature has been upheld. In his work on Constitutional Limitations, at page 98, Judge Cooley, in discussing legislation of this character, says: 'The rule upon this subject, as we deduce it from the authorities, seems to be this: If the party *standing in the position of trustee*, applies for permission to make the sale, for a purpose apparently for the interest of the *cestui que trust*, and there are no adverse interests to be considered and adjudicated, the case is not one which requires judicial action; but it is optional with the legislature to grant the writ by statute, or to refer the case to the courts for consideration, according as the one course or the other, on considerations of policy, may seem desirable.' But, in the present case, it does not appear that the application was made by a party 'standing in the position of trustee,' and there were 'adverse interests to be considered and adjudicated,' to-wit: those of the guardian. Upon the face of the act there is nothing to show that the legislature was informed that a general guardian of the estates of these infants had actually

been appointed. It is fairly to be presumed that they were ignorant of that fact. At all events, in view of the facts now found by the court below, the act cannot be permitted to operate, since, under the circumstances, it would be judicial and not legislative in its character, and for that reason unconstitutional.”

§ 69. **Of Special Acts Authorizing the Sale of Lands to Pay Debts.**—As the estate of an ancestor descends to his heirs, subject to the right of the creditors of the former to compel such estate to contribute to the payment of their claims, a special act to authorize the sale of property for the payment of such claims seems to be one of the most defensible acts of special legislation; and so it is, if the validity and existence of the claims be conceded. But special acts to raise funds for the payment of debts have been more persistently and plausibly assailed than acts for any other purpose short of ostensible confiscation. If such an act is so expressed as to preclude the parties in interest from disputing the validity of the debts, it is unquestionably void, because it is a usurpation of judicial authority. In 1827, the legislature of Illinois, by a special act, authorized John Lane to sell so much of the lands of the late Christopher Robinson, deceased, as should prove sufficient to raise the sum of \$1,008.87, and interest and cost of sale. The proceeds of the sale were to be applied to the extinguishment of the claims of said Lane and one John Brown for moneys advanced and liabilities incurred on account of Robinson's estate. This act was held to be clearly beyond the authority of the legislature, because the existence of the indebtedness from Robinson's estate to Brown and Lane, and the consequent right of Brown and Lane to satisfaction out of the proceeds of the estate, could only be ascertained as the result of a judicial investigation, which the legislature was incompetent to conduct. The act was also thought to contravene the constitutional provision, that “no freeman shall be disseized of his freehold, but by the judgment of his

peers, or the law of the land.”¹ The supreme court of Illinois has now taken a position far in advance of that assumed in the case just cited, and will not tolerate any special legislation authorizing the conveyance of real estate to pay debts, unless such debts have first been judicially established. In 1823, the legislature of that State authorized John Riee Jones, administrator of Thomas Brady, deceased, to sell and convey lands, the proceeds to be assets in the hands of the administrator, to be appropriated to the payment of the debts of the deceased, and the balance, if any, to be distributed among his children. Of this act, and a sale made by its authority, the court said: “When the act in question was passed, and when the land was sold, the title was in the heirs of Brady, subject to be divested, if necessary, for the payment of his debts. But the legislature had no more right or power to assume that he died owing debts, and, on that assumption, to authorize his administrator to sell lands vested in his heirs for the purpose of holding the proceeds as assets, without any judicial inquiry as to the existence of such debts before executing the power, than it would have had, in his lifetime, the right or power to authorize the sheriff of the county where he lived to sell his land, and hold the proceeds for the payment of whatever debts he might owe.”² The conclusion here announced is one which, upon principle, meets our full concurrence. But we understand the decided preponderance of the authorities to be in favor of sustaining special acts authorizing sales for the payment of the debts of the deceased owner of property, even in advance of the judicial ascertainment of such debts, provided the act leaves the existence of such debts open to inquiry.³

¹ *Lane v. Dorman*, 3 Scam. 238, 36 Am. Dec. 543, followed in *Dubois v. McLean*, 4 McLean, 486.

² *Rozier v. Fagan*, 46 Ill. 405; *Davenport v. Young*, 16 Ill. 548. 63 Am. Dec. 320.

³ *Watkins v. Holman*, 16 Pet. 25; *Davison v. Johonnot*, 7 Met. 388, 41 Am. Dec. 448; *Shehan's Heirs v. Barnett's Heirs*, 6 Mon. 593; *Holman's*

§ 70. **Special Act Need not Require a Bond for the Application of the Proceeds.**—Special acts authorizing the sale by one person of the property of another, generally contain precautionary provisions tending to secure the honest exercise of the authority conferred. Bonds are usually exacted, conditioned for the proper appropriation of the proceeds of the sale. By this means, the interests of heirs and creditors are exempted from needless peril. These precautions seem not to be essential to the validity of the act. The question is one of power. The existence of the power being established, the propriety of its exercise rests solely with the legislature. If, through misplaced confidence or reckless inattention to the duties of its trust, the legislature confers the power of sale on a person who, being required to furnish no security, squanders the proceeds of the sale, and thus defrauds the heirs of their inheritance and the creditors of their means of enforcing payment, the sale is not, on that account, invalid.¹

§ 71. **Acts for the Sale of Lands of Co-Tenants.**—The power of the legislature to authorize, by general laws, the sale of the lands of co-tenants for the purposes of partition, where the necessity of the sale is judicially determined, is unquestionable.² So there is little or no doubt of the constitutionality of a special act authorizing a co-tenant to petition a court of competent jurisdiction for the sale of the lands of a co-tenancy, and also authorizing the court, upon being satisfied that a division of the property among the co-tenants is extremely difficult, if not impracticable, to order a sale of the premises and a division of the proceeds

Heirs v. Bank of Norfolk, 12 Ala. 369; Kibby v. Chitwood, 4 Mon. 91, 16 Am. Dec. 143; Williamson v. Williamson, 3 S. & M. 715, 745, 41 Am. Dec. 636; Clusky v. Burns, 120 Mo. 567.

¹ Gannett v. Leonard, 47 Mo. 205; Thomas v. Pullis, 56 Mo. 218 Rider v. Reagan, 114 Cal. 667.

² Freeman on Co-Tenancy and Partition, sec. 540.

among the parties in interest.¹ Such an act leaves the necessity and expediency of the sale to be determined by the judiciary. Special acts which do this are free from constitutional objections, except in those States whose constitutions forbid special legislation.² In Pennsylvania, an act was sustained which empowered one of several heirs, without the aid of any judicial proceedings, to sell the lands descended from their common ancestor, and divide the proceeds among the co-heirs;³ and a decision similar in spirit has been made in Massachusetts.⁴

The courts of the State of Connecticut seem to have gone further than any other in sustaining the authority of the legislature to divest persons of property by sales made against their will, and without any ascertained or suggested necessity therefor. Thus, where a devise was made to H, for life, and upon her death to other persons, in certain contingencies, H, while in possession as tenant for life, petitioned the general assembly, praying for a sale of the property and showing that, while the property was worth about \$4,000, it produced a net income of only \$100 a year. The general assembly, by resolution, directed the sale of the lands by certain trustees, and the investment by them of the proceeds for the benefit of the parties according to their respective interests. The trustees were about to proceed under the act when the contingent remainder-men sought to prevent their so doing by suing out an injunction. The injunction was denied by the supreme judicial court which, in its opinion, said: "It is said by the petitioners that this resolution deprives them of their interest in the property against their will, and is therefore void, not only as opposed to natural justice, but as in conflict with the provisions of the constitution of this State. It was held by this court in

¹ *Edwards v. Popes*, 3 Scam. 465; *Metcalf v. Hoopingardner*, 45 Iowa, 510.

² *Florentine v. Barton*, 2 Wall. 210.

³ *Fullerton v. McArthur*, 1 Grant's Cas. 232.

⁴ *Soheir v. Mass. Gen. Hospital*, 3 Cush. 483.

the case of *Richardson v. Monson*,¹ that the statute which authorizes the sale of lands held in joint tenancy, tenancy in common, or coparcenary, whenever partition cannot conveniently be made in any other way, is constitutional. That case was ably discussed by counsel, who offered the same arguments against the constitutionality of the statute, which have been urged upon our consideration against the validity of this resolution. It is difficult to see any distinction in principle between the two cases. When a sale is made of real estate held in joint tenancy, the tenant opposed to the sale is as much deprived of his estate by the change which is made as these petitioners are of their property, by the change authorized by this resolution. In either case, the parties are not subjected to a loss of their property. It is simply changed from one kind of estate to another. In the case of *Sohier v. Massachusetts General Hospital*,² the court say in a case like the present: "The legislature authorizes the sale, taking care that the proceeds shall go to the trustees for the use and benefit of those having the life estate, and of those having the remainder, as they are entitled under the will. This is depriving no one of his property, but is merely changing real into personal estate, for the benefit of all parties in interest. This part of the resolve, therefore, is within the scope of the powers exercised from the earliest times, and repeatedly adjudged to be rightfully exercised by the legislature. In the case of *Rice v. Parkman*,³ it was held that the legislature might rightfully authorize a tenant for life to sell the whole estate, thus converting real into personal property, provision being made for securing the interests of those in remainder. We think the decision in the case of *Richardson v. Monson*, which we have referred to, must be regarded as decisive of this case. We think the resolution in question constitutional, and not

¹ 23 Conn. 94.

² 3 Cush. 496.

³ 16 Mass. 326.

opposed to natural justice, and we therefore advise the superior court to dismiss the petition.”¹ It will be seen from the foregoing quotation that the court relied very confidently on prior decisions made by the courts of Massachusetts. But the statutes sustained in Massachusetts authorized the sale of the estates of minor remainder-men who were incompetent to act for themselves, and, in this respect, we think a very substantial difference exists between those cases and that in Connecticut where there was no suggestion that the contingent remainder-men were under any disability or not fully competent to act for themselves.

§ 72. **Decisions Limiting the Power of Legislatures to Pass Special Laws for the Sale of Property.**—We shall now call attention to decisions which, though pronounced by courts which concede the power of a legislature to pass special acts authorizing the sale of property, prescribe limits beyond which the power is not recognized. In 1831, Thomas Poole devised his real estate to his executors in trust: 1st, to permit his daughter, Eliza, to occupy the same, and take the rents and profits thereof during her natural life; 2d, upon her death, the lands were to vest in her lawful issue, and, in default of such issue, then in all the testator’s surviving grandchildren. By special acts, passed in 1837 and 1849, the executors were authorized to sell and convey the real estate, and, with the proceeds, to pay all charges and assessments against the lands, and also the costs of sales and commissions. The surplus was then to be disposed of in the manner specified in the will for the disposition of the real estate. A sale was made under these acts. A case was then agreed upon and submitted, for the purpose of ascertaining whether the purchaser could acquire a valid title. It appeared that the daughter, Eliza, was still living, and that she had two children. The act was held unconstitutional, upon grounds which are not stated in

¹ *Linsley v. Hubbard*, 44 Conn. 109, 26 Am. Rep. 431.

the opinion of the court, with sufficient clearness to enable us to feel confident that we correctly understand them. We judge, however, that the reasoning controlling the decision of the court was substantially this: No necessity existed for the sale; there were no charges, liens or assessments against the property; and no infancy or other necessity shown as to the parties interested under the will; and that, under these circumstances, the acts authorized the taking of property from one person and transferring it to another without any reason.¹ Whether the children of Eliza, "who had a vested remainder in fee, in the premises in question, as tenants in common, subject to open and let in after-born issue of their mother, as tenants in common with them, and liable, however, to be divested by their deaths during the lifetime of their mother," were minors or adults, the report of the case very singularly omits to mention. The following reasoning of the court, in this case, tends very strongly toward the overflow of all legislation authorizing the transfer of the property of one person by another, without any imperative necessity, and without the assent of the owner: "If the power exists to take the property of one, without his consent, and transfer it to another, it may as well be exercised without making any compensation as with it; for there is no provision in the constitution that just compensation shall be made to the owner when his property shall be taken for *private* use. The power of making contracts for the sale and disposition of private property for individual owners has not been delegated to the legislature or to others, through or by any agency conferred on them for such purpose by the legislature; and if the title of A to property can, without his fault or consent, be transferred to B, it may as well be effected without as with consideration."²

¹ Powers v. Bergen, 6 N. Y. 358. See Leggett v. Hunter, 19 N. Y. 445.

² Powers v. Bergen, 6 N. Y. 367.

In California, it is settled that the legislature cannot authorize an administrator to sell, at his discretion, the lands of his intestate, as in his judgment will best promote the interest of those entitled to the estate. In this case, the heirs of the deceased consisted of his widow and minor children. We make the following quotations from the opinion of the court: "It is undoubtedly within the scope of legislative authority to direct that the debts be paid from the realty instead of the personal property; or, as is done in some States, that the heir need not be made a party to the proceeding to obtain a sale of the real estate, or that the administrator may sell without any order of the court whatever. But all these acts must be for the satisfaction of these liens, which are held to be paramount to the claim of the heirs or devisees.

"Laws which prescribe the manner in which these paramount claims shall be satisfied, are held to be entirely remedial; and it is upon this ground that the courts have upheld acts authorizing the administrator to sell at private sale, or in some mode not provided in the general law, the land of a deceased person. Such acts have been uniformly held valid where it appeared to be in execution of these liens, and the act was not liable to the objection that, in passing it, the legislature usurped judicial functions; as, for instance, in directing a sale to pay a particular debt, thereby ascertaining the existence of a debt by legislative enactment.

"In all the cases to which our attention has been called by the plaintiff, the decision expressly was put upon this ground. The duty of an administrator is to take charge of the estate for the purpose of settling the claims, and when they have been satisfied it is his duty to pass it over to the heir, whose absolute property it then becomes. To allow the administrator to sell, to promote the interest of those entitled to the estate, would be to pass beyond the proper functions of an administrator, and constitute him the

forced agent of the living for the management of their estates.

“In this case it does not appear, from the proceedings in the probate court upon the sale, that there were any debts of the deceased at the time of the sale, nor does it appear that the sale was to raise money for the support of the family, or to pay the expense of administration. The special act does not purport to authorize a sale for the payment of the debts, allowances to the family, or expenses of administration. On the contrary, it expressly authorizes a sale, for the purpose of speculation in the interest of the owners of the property—that is, the heirs. It provides that the administrator may sell, at his discretion, ‘the whole or any part of the real estate, or any right, title or interest therein claimed, held or owned by the said Charles White, at the time of his death, as in the judgment of the administrator will best promote the interest of those entitled to the estate.’ The probate judge may confirm or set aside the sale, as he may deem just and proper, and for the best interests of the estate.

“Upon the death of the ancestor the heir becomes vested at once with the full property, subject to the liens we have mentioned; and, subject to these liens, and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding that any other owner has. His estate is indefeasible, except in satisfaction of these prior liens, and the legislature has no more right to order a sale of his vested interest in his inheritance, because it will be, in the estimation of the administrator and the probate judge, for his advantage, than it has to direct the sale of the property of any other person acquired in any other way. * * * It is not contended that the legislature has the power to direct the sale and conveyance of private property for other than public uses. This question was fully considered, however, by us

in *Sherman v. Buick*,¹ and decided in the negative, and that conclusion is fully sustained by the numerous authorities cited by the defendant.”²

We are unable to concur with the supreme court of California in the opinion foreshadowed in *Brenham v. Story*, and adopted in *Brenham v. Davidson*,³ that the power of the legislature to confer authority on guardians is, where the persons in interest are not *sui juris*, any more ample than its power to confer like authority in a like case on administrators. If the legislature has the power to authorize sales, we cannot conceive that it is limited in the choice of agents to execute the power. It is true that the duties of administrators and guardians are somewhat different under the general laws in force in most of the States. But when a special act is passed, the power to be exercised is delegated and prescribed by the special act, and not by the general law. The power of the agent is not, therefore, limited by the fact that, before the passage of the act, he was an administrator, and, as such, had no authority, under the general law, to make a sale when, in his discretion, he thought best. Special acts authorizing sales are maintainable, if at all, because, in the language of Chancellor Walworth: “It is within the power of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition and management of the property and effects of infants, lunatics and other persons who are incapable of managing their own affairs.”⁴ If the persons interested in an estate are thus incapable, we see no reason why the power of disposing of their estate may not be delegated to an administrator, or even to a stranger, as well as to the guardian. The two California cases last cited are, therefore, irreconcilable in

¹ 32 Cal. 241, 91 Am. Dec. 577.

² *Brenham v. Story*, 39 Cal. 185.

³ *Brenham v. Davidson*, 51 Cal. 352.

⁴ *Cochran v. Van Surlay*, 20 Wend. 373, 32 Am. Dec. 570.

principle, and one or the other ought to be overruled; for, in each case, the legislature authorized a sale to be made without the assent of the owner of the property, and in the absence of any disclosed necessity therefor. In each case the person designated by the legislature was invested with a discretion to make the sale as he might deem best, except that, in the one case, he was instructed to promote the interest of those interested in the estate, while in the other, no such instruction was given. And yet the latter was upheld and the former suffered to fall, and this upon the ground that in the one case the person selected by the special act was a guardian, and in the other he was an administrator.¹ In the case of a guardian's sale, the persons whose property is to be sold are within the reason of the rule, as stated by Chancellor Walworth. In the case of a sale by an administrator, the heirs may or may not be within the reason of the rule as thus stated. If all the owners of the property are not *sui juris*, and are, therefore, within the reason of the rule, then the sale should be sustained, whether the agent selected by the legislature be an administrator or a guardian, or have no other official capacity than that given him by the act. If, on the other hand, any of the owners be *sui juris*, the sale must fall, if made against his will, whether the agent appointed to make it is a guardian or an administrator. Persons regarded in law as capable of conducting their own affairs are entitled to act for themselves. They are the sole judges of the advisability of selling their property. The legislature cannot, against *their* will, empower any other person to sell and convey *their* interests, even though infants, or persons not *in esse* have estates and interests in the same parcels of property.²

When property of an ancestor has descended to his heirs, or when, by any means, property has become vested in

¹ See *Brenham v. Davidson*, 51 Cal. 352; *Brenham v. Story*, 39 Cal. 185.

² *Brevoort v. Grace*, 53 N. Y. 245; *Shoenberger v. School Directors*, 32 Pa. St. 34.

adults who are not subject to any disability and who must, therefore, be regarded as capable of managing their own affairs, it is now, we think, settled almost beyond dispute that the legislature cannot, by any subsequent enactment, whether general or special, in effect take from such persons the management of their property by authorizing its sale for the purpose of reinvestment, or because either in the opinion of the legislature or of some court to which the question may be submitted, such sale may appear for the best interests of those concerned. The Code of Civil Procedure of California, as amended in 1893, purported to authorize the sale of the real property of a decedent "on the ground that it is for the advantage, benefit or best interest of the estate and those interested therein." The court held that this statute was unconstitutional if sought to be applied to heirs whose title had vested prior to the enactment, saying, that upon the death of their ancestor their title became vested at once, subject to such liens as existed thereon and the temporary right of possession on the part of the administrator, and the heirs had the same right to judge themselves of the relative advantage of selling or holding their property than any other owner had; that their estate was indefeasible except in satisfaction of prior liens, and that the legislature had no more right to order a sale of their interests, because it would be in the estimation of the administrator and the probate judge for their advantage, that it had to direct the sale of the property of any other person acquired in any other way.¹ A statute of Wisconsin authorized an executor to sell all the property of his decedent situate within the State, and thereupon to execute all necessary instruments of conveyance or transfer in the usual form with or without the usual covenants of warranty. There were no recitals in the act showing any reason for conferring this power of sale. The court said: "The act in question is nothing more or less than an arbi-

¹ Estate of Packer, 125 Cal. 396, 73 Am. St. Rep. 58.

trary attempt on the part of the legislature to authorize an individual, who does not appear to have any estate or right to the real estate in question, either as trustee or otherwise, to sell and convey the same to such persons and for such price as he may deem expedient; nor does it attempt to provide that he shall turn over the proceeds of the sale to the persons holding the title of the lands sold. The fact that the legislature calls him the executor of the last will and testament of Francis B. Webster does not change the nature of the act. His being executor of the will of a deceased person does not prove that he had any estate or interest in the real property of the deceased, or any power to sell the same.”¹ A wife died intestate, leaving her husband and children as her sole heirs at law. He was appointed and qualified as her administrator, and as such paid all claims against her estate in due course of law, but he thereafter sold her real property under a special statute authorizing him so to do. The court said: “Apparently, the only object sought to be attained was to enable an administrator to convert property owned jointly by himself and children, but two of whom were under disability, into money for the sole purpose of distribution. Special statutes authorizing a guardian to sell the estate for the maintenance and education of minor heirs, or the payment of debts, subject to which they obtained title at the death of an ancestor, and with which the property is still burdened, have been sustained for the reason that the rights of creditors are paramount, and upon the theory that the legislature should, when necessary, protect the weak and promote the welfare of persons incapacitated by some legal disability from disposing of their own estate. No necessity appears to have existed for a sale of the premises, and obviously the legislative act invades the functions of the judiciary. In contravention of the federal constitution, and the organic law then in force in this jurisdiction, tenants in common and

¹ Culbertson v. Coleman, 47 Wis. 193.

the owners of private property were, without their consent, and in absence of notice or an opportunity to be heard, divested of their estate without due process of law, and the act relied upon to justify the transaction is therefore unconstitutional and void.”¹ In expressing its views upon this subject, the supreme court of Missouri said: “It will be readily inferred from what is said in the opinion in these cases that the authority by the legislature can go no further than to authorize the sale of the land of such persons as are under such disability as prevents them from exercising that right in their own names, unless it be for the satisfaction of legal charges upon the land, or for the payment of debts subject to which the title is held.”² Probably no case can be found reported which upholds a sale, made under authority of an act of legislature, by which the person authorized conveyed, without his consent, the land of another who was himself capable of transacting his own business, except under circumstances above stated. On the contrary, all the decisions which speak at all on the subject assert the contrary. Such a sale would be equivalent to depriving the owner of his property without due process of law, and would be violative of both the State and federal constitutions.³ The court of appeals of Kentucky declared unconstitutional section 491 of the Civil Code of that State, in so far as it authorized the sale upon petition of a life-tenant and in opposition to the wishes of the owner in fee when he was not laboring under any disability, saying: “After a careful consideration and full investigation we have concluded that the section referred to, and to the extent indicated, is unconstitutional. It operates in effect to take the property of one individual and transfer it to another, when neither is under such disability as to re-

¹ Johnson v. Branch, 9 S. Dak. 116, 62 Am. St. Rep. 857.

² Cargile v. Fernald, 63 Mo. 304; Hindman v. Piper, 50 Mo. 294; Wilkinson v. Leland, 2 Pet. 627; Watkins v. Holman, 16 Pet. 25.

³ Garnett v. Leonard, 47 Mo. 206; Kneass' Appeal, 31 Pa. St. 91; Hindman v. Piper, 50 Mo. 249; Burns v. Cluskey, 120 Mo. 567.

quire the guardianship of the courts. Where any of the citizens are incapacitated to act for themselves, it becomes the duty of the State to protect their interests, and it is upon this idea and for this reason that jurisdiction has been conferred to sell and reinvest the proceeds of property belonging to such persons when, in the judgment of the court, it is to their interest. The court acts and consents for them because they cannot act or consent for themselves. But so long as the citizen is under no legal disability to act for himself in the management of his property, he is protected by the constitution from interference on the part of the State, whether that interference comes directly by legislative act, operating immediately upon the property, or intermediately through the courts. There may be cases of tenancy in common, or even of joint tenancy, where the courts can be authorized to sell the property so held, and one of the joint tenants or tenants in common, who is *sui juris*, refuses, without reason, to sell. But even in that case there would be no power in the court by legislative enactment to reinvest the proceeds of the property of the recalcitrant tenant. Such cases, as said by Chief Justice Lewis, in *Kneass' Appeal*,¹ are placed on the ground of the 'necessities of justice.' In all such cases, where sales have been sanctioned, there was a joint ownership in fee, and a joint right of possession, conditions not existing in this case. In addition to these cases, it has been held that when the interest is not vested, but contingent, a sale might be had without the consent of the contingent remainder-man. In the case under consideration the party seeking to have the fee disposed of against the will of the owner has only a qualified or limited interest that may be terminated at any moment. She has in no way been interfered with by appellants in the enjoyment of what estate she has in the property; and if the property is not so productive to her by reason of the burning of the house, it is her misfortune

¹ 31 Pa. St. 91.

which operates with detriment to appellants as well as to appellee, and that without any fault of appellants. To hold that a life tenant, when it may appear to be to his or her interest, may go into a court of equity, and in opposition to the wish of the remainder-man have the fee sold and the proceeds reinvested, would operate to destroy estates in remainder. It will not do to say that the court first determines that it will be to the interest of the remainder-man before a sale will be authorized. The court has no right to appoint a guardian for one who is *sui juris*, nor to consent for or to act for him. So long as the person is not disabled to manage the property, his or her judgment must determine the question as to whether a sale would be to his or her interest, unless in the case of tenancy in common and joint tenancy heretofore mentioned.”¹

The fact that the person whose estate is sought to be divested by a sale to which he does not consent acquired his interest prior to the enactment of the statute asserted against him is a very material one. Especially is this true where his interest is that of an heir, and the statute under which it was sold is general in character, applying to all persons under like circumstances. It is well known that the right of succession is a creature of the statute, and, as it may by statute be withheld altogether, it may also be limited and made subject to such conditions as the legislature sees fit to impose. Hence, a statute authorizing a court exercising jurisdiction over the estate of a decedent to order the sale of the real or other property thereof when it appears to the satisfaction of the court that it is for the advantage, benefit, or best interest of those interested in the estate so to do, is constitutional and valid when applied to heirs whose interest as such became vested after the enactment of the statute. In so holding the court, after referring to *Brenham v. Story*,² said: “The distinction,

¹ *Gossam v. McFarran*, 79 Ky. 236.

² 39 Cal. 179.

however, between that case and this lies mainly in the fact that here the amendment of 1893 was in force before the death of Porter, and, therefore, the estate vested in the heir, if any be had, subject to the exercise of the power given to the court by the amended statute. This amended statute has heretofore been called to the attention of this court in but one case, so far as I am aware, namely, in *Estate of Packer*.¹ In that case *Brenham v. Story*² was followed because Packer died while a resident of this State before the said amendment of 1893 was enacted, and for that reason this court declined to consider whether said amendment was constitutional when applied to the property of persons dying after its passage, as that question did not arise. Here, the question is properly before us, and must be decided. It is a fundamental proposition that governments are formed, among other things, for the protection, not only of the rights of property, but of property itself; and its power to provide for the custody, care, and the descent and distribution of the property of intestates, real and personal, as well as the disposition of it by will, is unquestioned.³ It is true that under our statute, upon the death of the ancestor, the property of the intestate at once vests in the heir; but it vests subject to conditions imposed by the statute, such as the qualified possession and control of the administrator, under the direction of the court for its care, and its appropriation to the payment of the debts of the decedent, expenses of administration, and other liabilities enumerated in the statute; but the right of the heir to inherit the estate, being itself the creature of the statute, there can be no question as to its power to impose these liabilities upon the estate, subject to which the property vests in the heir. That the administrator, under the control and direction of the court, is charged with the duty of

¹ 125 Cal. 396, 73 Am. St. Rep. 58.

² 39 Cal. 179.

³ *In re Wilmerding*, 117 Cal. 281, 284.

preserving the property until final distribution cannot be doubted. He must, if there are funds, preserve the title to the real estate by the payment of taxes, and its value by making necessary repairs, and is entitled to receive the rents and profits until the estate is settled, and must 'preserve it from damage, waste, and injury.' So the administrator, under the order of the court, at any time after receiving letters, may sell 'perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept,'¹ whether there are debts or other liabilities to be paid or not; and this direction of the statute has no other basis than that of the preservation of the best interests of those in whom the statute vests the right of property when it is not required to meet some charge imposed by law, and cannot be immediately delivered to the heir. So perishable property may be attached under a disputed contract liability, and be sold by order of the court before the defendant's liability is established. These instances in which the State, by its statutes, disposes of private property, are familiar and unchallenged, and are based upon the duty and power of the government to prevent injury by converting one kind of property into another for the benefit of the owner. The statute before us involves no different principle, nor the exercise of any different power. We see no difference in principle between the sale of 'personal property likely to depreciate in value, or which will incur loss or expense by being kept,' and the sale of real estate under the facts, found by the court in this case, nor any difference in the exercise of legislative power in the two cases. The statute under consideration divests no one of his property, but authorizes one's real estate to be transmuted into personal property under such circumstances that the consent of the owner, if capable of giving it, would be presumed."²

¹ Code Civ. Proc. § 1522.

² Estate of Porter, 129 Cal. 86, 79 Am. St. Rep. 78.

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